

84-614 ①

Or. Supreme Court, U.S.

FILED

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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

SALLY CORD HUMMEL, VALLEY BANK OF NEVADA, HAFTCO,
PETER RUSSELL KIRK HUMMEL and ERRETT ALLEN HUMMEL,
Petitioners,

VS.

MONT PELERIN CORPORATION, N.V.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FOUR
AFTER DENIAL OF PETITION FOR HEARING BY THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

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QUESTIONS PRESENTED

1. Whether or not Article I, Section 10 of the United States Constitution, which prohibits a state from enacting laws impairing existing contract rights, has been violated by a California court's ordering a sale of California real property contained in a trust created in Illinois in 1935, contrary to the express terms of the trust, said order of the court being made pursuant to California Code of Civil Procedure, Sections 872.820 and 872.840 adopted in 1976.
2. Whether or not the due process clause of the United States Constitution has been violated by a California court's ordering a sale of California real property contained in a trust created in Illinois in 1935, contrary to the express terms of the trust, said order of the court being made pursuant to California Code of Civil Procedure, Sections 872.820 and 872.840 adopted in 1976.
3. Whether or not Article I, Section 10 of the United States Constitution and/or the due process clause of the United States Constitution have been violated by the retroactive application by a California court of a 1976 California statute and the ordering of a sale of California real property contained in a trust created in Illinois in 1935, which trust prohibits the sale of any trust assets without the consent of the investment consultant to the trust (Petitioner SALLY CORD HUMMEL).

LIST OF PARTIES

Petitioners herein were the appellants in the Supreme Court of the State of California and defendants in intervention in the Superior Court for the County of Los Angeles, State of California.

Respondent herein was respondent in the Supreme Court of the State of California and plaintiff in intervention in the Superior Court for the County of Los Angeles, State of California.

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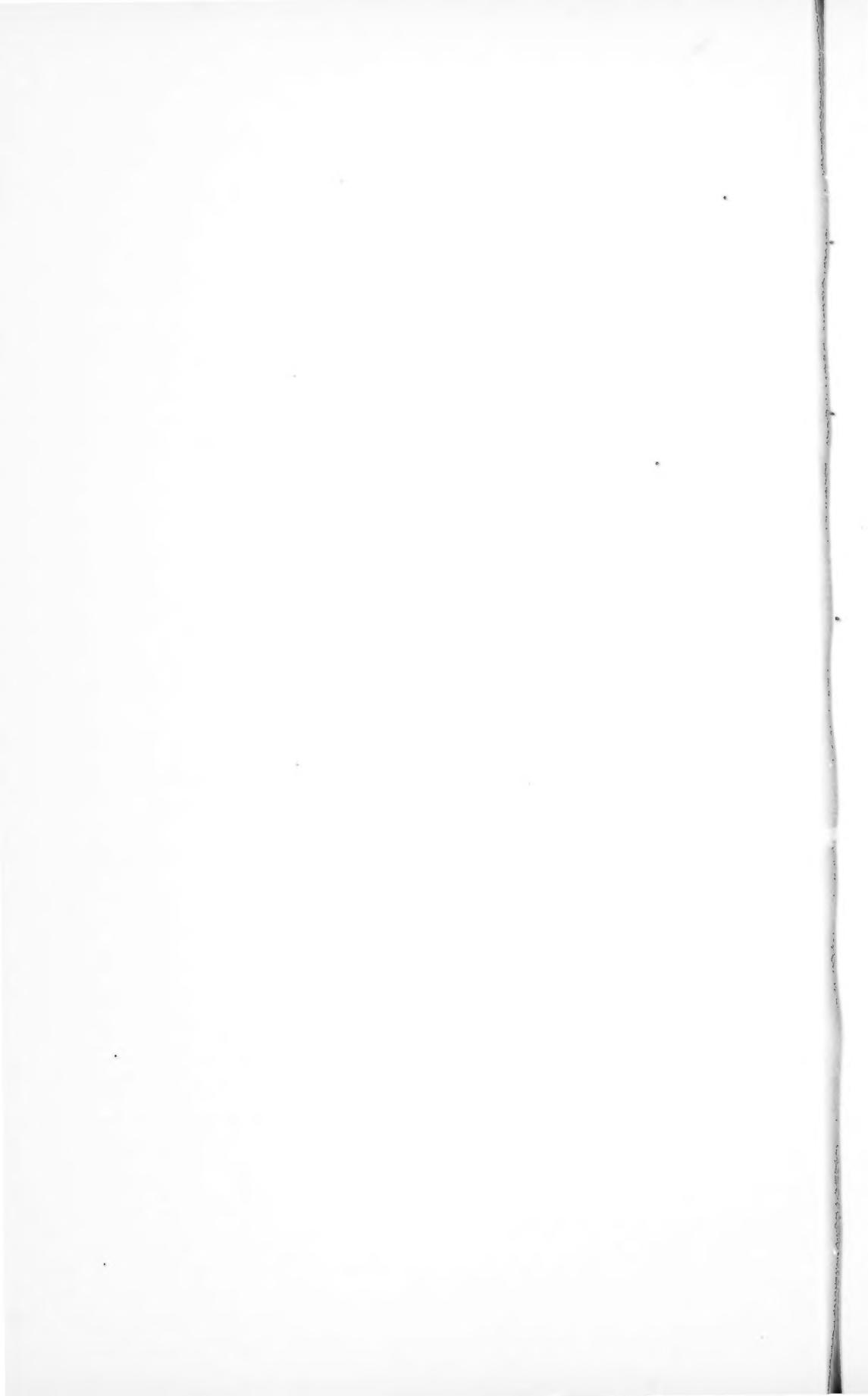
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SALLY CORD HUMMEL, VALLEY BANK OF NEVADA, HAFTCO, PETER RUSSELL KIRK HUMMEL and ERRETT ALLEN HUMMEL, your Petitioners, respectfully pray for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Four, after denial of petition for hearing by the California Supreme Court.

OPINION BELOW

This Petition for Certiorari follows the affirmance of a judgment entered by the trial court in favor of Respondent allowing partition by *sale* of property located in Beverly Hills, California. The property, near the intersection of Rodeo Drive and Wilshire Boulevard, is extremely valuable and is a potential site of a luxury hotel. It has been in the E. L. Cord family since 1951. A description of the property (hereinafter "Property") is located on page 6 hereof.

In October of 1977, Douglas A. Scott (appellant in the lower court action but not joining in this Petition for Certiorari and hereinafter "Scott"), who held a 2% interest in the Property, filed a lawsuit against First National Bank of Nevada (hereinafter "FNB") and United California Bank (hereinafter "UCB"), who were trustees of a trust created by E. L. Cord in 1935 (hereinafter "1935 Trust") that held the majority interest in the Property, and L, Inc., a Nevada corporation that managed the Property. L, Inc. was a wholly-owned corporation of E. L. Cord. Scott's lawsuit alleged that the Property had been mismanaged. In April of 1978, Respondent acquired from certain of the trusts that also held interests in the Property a 65% interest in the Property and, in addition, purchased Lots 752 through 754 from the Estate of E. L. Cord. Respondent's purchase of the 65% interest in the Property was contingent on its being able to buy 100% of Lots 752 through 754. In November of 1978, Respondent intervened in the Scott lawsuit by filing a Complaint-in-Intervention for partition against FNB as trustee of the 1935 Trust as well as naming SALLY CORD HUMMEL (hereinafter "HUMMEL"), PETER RUSSELL KIRK HUMMEL (hereinafter "PETER"), ERRETT ALLEN HUMMEL (hereinafter "ERRETT"), UCB (the subtrustee holding

title to the Property on behalf of FNB), Virginia Kirk Cord (HUMMEL'S mother), Scott and Leonard Olinger, all of whom had an interest in the Property. HUMMEL, PETER and ERRETT answered the Complaint-in-Intervention and cross-complained against FNB and others contending, among other things, that FNB mismanaged the 1935 Trust and breached their fiduciary duty to HUMMEL, PETER and ERRETT in many areas, one of the principal ones being facilitating the sale of Lots 752 through 754 and the 65% interest in the Property to Respondent without protecting HUMMEL, PETER and ERRETT.

The HUMMEL and Scott actions against FNB were severed from the partition action and proceeded to trial first before the Honorable Lester E. Olson, judge of the Los Angeles County Superior Court. Prior to trial, Security Bank of Nevada became the trustee of the 1935 Trust and Seck & Co. became the subtrustee. After trial, Judge Olson filed his Notice of Tentative Decision allowing Respondent to partition by sale. (Appendix A)

Petitioners and Scott filed a motion for new trial and a motion to vacate judgment. The trial court denied the motion for new trial but granted in part the motion to vacate judgment and enter new judgment. The new judgment was entered because the trial court found that insufficient evidence had been introduced to justify the partition of the mineral and hydrocarbon rights. (Appendix B) The new judgment provided for, among other things, partition by sale of the real and personal property with the exception of mineral and hydrocarbon rights 500 feet below the surface.

A notice of appeal was filed by all Defendants except Olinger and Virginia Cord.

The California Court of Appeal affirmed the judgment of the trial court. (Appendix C) Petition for Rehearing

was filed by Petitioners and Scott and denied by the Court of Appeal. (Appendix D) A Petition for Hearing was filed with the California Supreme Court and the Petition was denied. (Appendix E) On September 14, 1984, Judge Olson signed an order substituting Valley Bank of Nevada as trustee and Haftco as subtrustee of the 1935 Cord Trust in place of Security National Bank of Nevada and Seck & Co. (Appendix F)

JURISDICTION

The decision of the Court of Appeal upholding the trial court judgment of which review is sought herein was made and entered on May 23, 1984 (Appendix C) and became final by denial of a petition for rehearing on June 11, 1984. The California Supreme Court denied the Petition for Hearing on July 25, 1984. (Appendix E)

The jurisdiction of the Court is invoked under Title 28, U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

California Code of Civil Procedure Sections 872.820, 872.840
California Revenue and Taxation Code Section 17953.
Internal Revenue Regulations Sections 26.2601-1(b)(1)(i)
and 26.2601-1(a)(5).

Constitution of the United States, Article I, Section 10 and
Fourteenth Amendment.

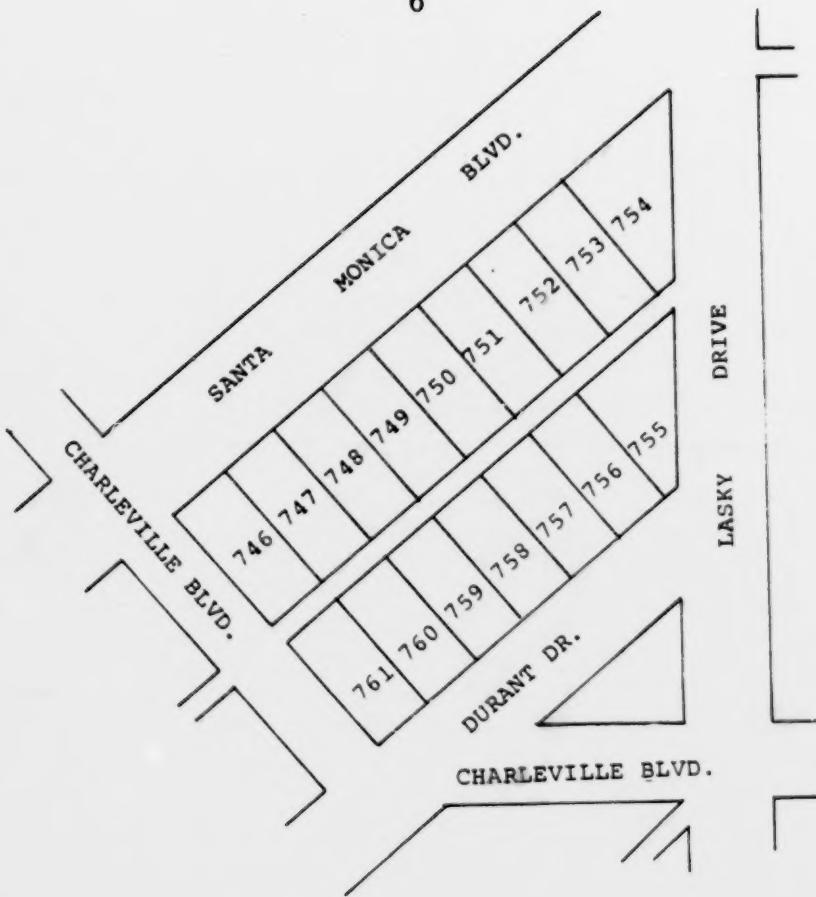
STATEMENT OF THE CASE

On August 21, 1935, E. L. Cord, a renowned and wealthy entrepreneur, created a \$100,000 inter vivos trust naming himself as trustee. (Appendix G) This trust contained four \$25,000 accounts with each account designated for one of four beneficiaries: His daughters Sally Cord Hummel

(Petitioner herein) and Nancy Phelps, his wife Virginia Cord, and his son Charles Cord.

On October 18, 1948, E. L. Cord executed an amendment to the 1935 Trust (hereinafter "1948 Amendment") entitled "Appointment of New Trustee Under Trust Indenture" designating the First National Bank of Chicago as the successor to E. L. Cord as trustee for the 1935 Trust. (Appendix H) That document also provided that "*[e]ach beneficiary of a trust fund who is now, or who shall hereafter become, twenty-five (25) or more years of age shall be and is hereby appointed Investment Consultant of his or her trust fund. . . . [¶] The Trustee shall not at anytime or times, whether or not there is an Investment Consultant or Consultants qualified and acting as hereinabove provided, make any sale or investment of any property or money comprising any trust fund, except upon the written approval of such Investment Consultant or Investment Consultants. . . .*" This provision gave each beneficiary control over their individual trust accounts.

In January 1951, E. L. Cord acquired title to the Property that is the direct subject of this action. Three to four years later, he acquired three lots which are contiguous to the Property but are not the direct subject of this action. The Property consists of eleven lots on a sixteen-lot parcel. It may be diagramed as follows:



A medical office building (the Beverly Hills Medical Building) is located on Lots 755, 756 and 757. The remaining lots (747 to 750 and 758 to 761, inclusive) are all occupied by a parking lot. It is only Lots 747 to 750 and 755 to 761, inclusive, and the property rights to the adjacent alley that are the direct subject of this action. Lot 751 was purchased from an unrelated third party by a related entity of Respondent, Belvedere Corporation, just prior to Respondent's purchase of its interest in the Property, and Respondent purchased from the Estate of E. L. Cord Lots 752 through 754 at the time it purchased its interest in the Property. Lots 751 through 754 are relevant if the trial court's decision ordering the Property to be sold is upheld.

On March 1, 1955, E. L. Cord placed the Property into a land holding trust with Coll Gillies as trustee (hereafter "Gillies trust"). (Appendix I) Each of the four subtrusts of the 1935 Trust was given a 10% beneficial interest in the Gillies trust. A 10% beneficial interest was also given to trusts established for Susan Pereira and Christopher Cord. A 1% beneficial interest was given to trusts established for Meredith Lawrence, Gene Quinney and Katherine Olinger. E. L. Cord was the beneficial owner of the remaining 37%. In May of 1956, Mr. Cord transferred an additional 5% beneficial interest in the Property to each of the four beneficiaries of the 1935 Trust and to the Pereira trust. He transferred a 3% interest each to the Charles Cord, II, trust, the Joanne Cord Davis trust and to Lola Mae Thorpe Smith. This left E. L. Cord with a 3% beneficial ownership in the Property.

The Gillies trust originally provided that the beneficial owners of 66 $\frac{2}{3}$ % interest in the Property had the power to give the trustee instructions regarding the management and control of the trust property.

On September 19, 1969, William K. Stevens, who had been acting trustee of the Gillies trust, resigned, and FNB was appointed as successor trustee. FNB also became the successor trustee of the 1935 Trust at approximately the same time. UCB was appointed subtrustee to hold title to the land in California.

In 1968 or 1969, E. L. Cord formed C, Inc. In 1970, he transferred to it the three lots which are contiguous to the Property. At approximately this same time, E. L. Cord formed L, Inc. In 1973, C, Inc. replaced UCB as the legal title holder of the Property. In 1976, it was replaced in this function by L, Inc.

On March 5, 1973, FNB executed a lease and management agreement with L, Inc. whereby L, Inc. agreed to manage

the medical clinic. Charles Cord, as an officer of L, Inc., was primarily responsible for managing the clinic. Ed Neuhoff, E. L. Cord's long-time attorney, was also an officer of L, Inc.

In January of 1972, E. L. Cord died, leaving an estate valued at approximately \$39 million, including the 3% beneficial ownership of the Property. Also left in his Estate was the stock of C, Inc., which in turn held title to the three lots contiguous to the Property.

On March 1, 1976, the Gillies trust expired by its own terms, and the legal title to the Property was transferred to the beneficial owners under that trust. In 1976, the officers of L, Inc. decided that they no longer wanted to manage the Property due to dissension among the beneficiaries. FNB as the holder of legal title to the Property purchased the stock of L, Inc. on behalf of the beneficial owners against the wishes of HUMMEL. Mr. Gardner (the trust officer at FNB who administered HUMMEL'S trust) and Mr. Ponton (the trust officer at FNB who administered Phelps' trust) became officers of L, Inc. and took over the responsibility of managing the Property.

At about this time, several of the beneficiaries of the various trusts owning an interest in the Property expressed their desire to sell their interest in the Property. Several offers to buy the Property were rejected. HUMMEL did not want to sell. To aid certain beneficiaries of the 1935 Trust that wanted to sell the Property, L, Inc. and FNB (through Gardner and Ponton acting in their conflicting dual roles as *trustees and managers*) made a decision to accommodate those beneficiaries who wanted to sell their 1935 Trust interests in the Property by engaging in a management policy of (1) *renting office space below market value*; (2) *entering into short term leases or no leases*; and (3) *leaving space vacant*. HUMMEL contends that not only

did those actions harm her interest in the 1935 Trust, but they also violated the Management Agreement. All of this was done intentionally by FNB, Gardner and Ponton and worked to the detriment of HUMMEL. With few exceptions, tenants were on three-year leases commencing January 1, 1974, and ending December 31, 1976. All of those leases except the few where options were provided became month-to-month tenancies on January 1, 1977 at the same rent as was charged January 1, 1974. The reason that the rent was not raised by L, Inc. (FNB) was to facilitate the sale of the Property. Incredibly, space was left vacant and rents remained static from 1974 through June of 1979 in a real estate market that escalated faster than probably any real estate market in the world. In addition, FNB compounded its action by engaging in a course of conduct wherein they consistently wrote and called HUMMEL and attempted to coerce her into selling her interest in the Property by telling her:

1. They would resign as trustee;
2. The Property was not productive, while at the same time not telling her that the reason the Property was not productive was because FNB was holding down income. FNB advised HUMMEL that she would incur capital gains expenses because of the fact that the Property was not productive; and
3. Engaging in conversation wherein Gardner felt that HUMMEL was going to have to be "forced" to sell. In addition, despite repeated requests by SCOTT and HUMMEL, FNB refused to secure a proper appraisal of the Property while at the same time advising HUMMEL that it ought to be sold for the price offered by prospective purchasers.

On March 8, 1978, Respondent agreed to purchase a 34% interest in the Property. On March 20, 1978, it agreed to purchase an additional 31% interest. In both of these pur-

chase agreements, Respondent included an addendum which provided that the "[s]eller has no information or knowledge of any written or oral agreement relating to the portion of the Beverly Hills Medical Building or any portion thereof being sold hereby which would prohibit or in any way impede a court-ordered partition of the Beverly Hills Medical Building or any portion thereof, either in kind or by a court-ordered sale." HUMMEL was not advised that FNB was taking this position nor was she advised that FNB was signing a document to that effect. The beneficial owners of trusts that had an interest in the Property sold gave similar warranties individually to Respondent. Title to the 65% interest in the Property encompassed by the above two agreements was transferred to Respondent on May 4, 1978.

Respondent agreed to purchase the 3% interest in the Property held by the E. L. Cord Estate but the Nevada Probate Court allowed overbidding and Virginia Cord, E. L. Cord's wife, purchased the Property. Respondent's purchase of the 65% interest was contingent on its purchasing the three lots contiguous to the Property. Respondent succeeded in purchasing the three lots. The sale of the three lots enabled Charles Cord to sell his and his children's undivided interests in the Property held in their trusts to Respondent. In March of 1979, Respondent acquired an additional 4% interest in the Property, bringing its total in the Property to 69% by the time of trial.

The purchase documents signed by Respondent, as well as the certificates signed by the investment consultants of the other trusts that sold, indicate that trusts, including the 1935 Trust, were selling interests in the Property. Also, one of the purchase documents was drafted by Guild, Hagen & Clark, Ltd., the attorneys for the Phelps' 15% that was selling. Bruce Glickfield (Respondent's attorney) testified at trial that he did not ask Phelps' attorneys to see the trust instrument so that he could make his own independent

evaluation as to the effect of the language in the 1935 Trust and 1948 Amendment and both Robert and Nancy Phelps and Charles Cord, in their depositions testified that Respondent did not ask to see the 1935 Trust or the 1948 Amendment. Also, at no time did Respondent ask HUMMEL if it could see the 1935 Trust nor did it ask her whether or not she felt that Respondent would be prohibited from partitioning. Clearly, Respondent had actual and constructive notice of the 1935 Trust and its terms.

Also, on March 9, 1978, prior to Respondent's purchase of its interest in the Property, Bruce Glickfield wrote a letter to Gardner at FNB requesting that no leases be entered into until Respondent purchased its interest. Gardner acquiesced in this request, again against the interests of HUMMEL'S interest in the 1935 Trust. He also failed to inform HUMMEL that he had reached that decision. This is important because Respondent contended at trial that it had nothing to do with the alleged mismanagement of the Property and yet it specifically requested that vacant space not be rented, which was contrary to the best interests of HUMMEL's interest in the 1935 Trust. Significantly, in May of 1978, *after* the sale to Respondent went through, Respondent dictated its terms of management to FNB, and FNB at that time completely reversed the position it had taken prior to the sale to Respondent and indicated to Respondent that long-term leases were appropriate.

The remaining interest holders in the Property refused to sell. At the time of trial, the remaining 31 percent was owned as follows: HUMMEL'S interest in the 1935 Trust owned 15%, William Cord Hummel (HUMMEL'S son) beneficially owned 1½%, ERRETT (HUMMEL'S son) beneficially owned 1½%, PETER (HUMMEL'S son) beneficially owned 2%, Virginia Michele Hummel Arrington (HUMMEL'S daughter) beneficially owned 2%, Robert Errett Arrington (HUMMEL'S grandson) beneficially

owned 1%, and Edgar S. Hummel (HUMMEL'S son) beneficially owned 1%. Legal title to this 24% was held by Seck & Co., the nominee of Security Bank of Nevada, the trustee of the various trusts holding beneficial interests in the Property. The remaining interests owned were 5% by Leonard Olinger (a nonappellant) and 2% by SCOTT and Albert Scott as joint tenants. Albert Scott is not a party to this action but has stipulated that he is bound by any partition the court orders.

STAGES AT WHICH THE FEDERAL QUESTION WAS RAISED AND PRESERVED

Petitioners resisted Respondent's *right* to partition action on many grounds, one of the principal ones being that under California law and the 1935 Trust and the 1948 Amendment, no property of HUMMEL'S in the 1935 Trust could be partitioned without HUMMEL'S consent. HUMMEL also contended that to allow partition by sale, as contrasted from division, of her property in direct violation of the terms of the trust is an unconstitutional impairment of her and the beneficiaries' contract rights and a taking of trust property without due process. This was argued orally in the closing argument at the trial, which was not reported, and raised in writing in the Motion for New Trial and the appeal. (Appendix J) The trial court rejected said contentions and ordered a partition sale, and the trial court's decision has been upheld by the California Court of Appeals and the California Supreme Court.

ARGUMENT**I.****CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 872.820 AND 872.840, ADOPTED IN 1976, WHICH ALLOW PROPERTY IN AN EXPRESS TRUST TO BE SOLD, CANNOT CONSTITUTIONALLY BE APPLIED TO THE 1935 CORD TRUST.**

A. Article I, Section 10 of the United States Constitution Prohibits States From Enacting Laws Impairing Contracts, and Thus the State Court Decision Authorizing a Forced Sale of Real Property Contained in the 1935 Cord Trust Must Be Overturned Because the Trust Prohibits Such a Sale.

Article I, Section 10 of the United States Constitution provides in pertinent part that:

“1. No State shall . . . pass any . . . law impairing the obligation of contracts, . . .”

The Fourteenth Amendment of the United States Constitution provides in pertinent part that:

“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .”

Section 872.820 of the California Code of Civil Procedure, which is part of the California statutory scheme pertaining to partition, reads as follows:

“Notwithstanding Section 872.810, the court shall order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations:

“(a) The parties agree to such relief, by their pleadings or otherwise.

“(b) The court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property. For purposes of making the determination, the court may appoint a referee and take into account his report.”

Section 872.840 of the California Code of Civil Procedure provides in pertinent part:

“(a) Where the property or an interest therein is subject to an express trust, the court may, in its discretion, order that the property be sold.”

In the case at bar, California Code of Civil Procedure Sections 872.820 and 872.840, adopted in 1976, cannot constitutionally be applied to the 1935 Trust because to do so would allow a court to order the sale of the real property in the 1935 Trust even though the trustee is not authorized, according to the terms of the Trust, to sell any Trust assets without the consent of HUMMEL. This would unconstitutionally impair the contractual obligations existing between the trustee and the beneficiaries, thereby causing substantial harm. In discussing what is included within the ambit of Article I, Section 10, the United States Supreme Court as far back as 1877 stated that:

“The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract as such in the view of the law ceases to be and falls into the class of those ‘imperfect obligations’ as they are termed which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable.” *Edwards v. Kearzey*, 96 U.S. 595, 6 Otto. 595, 24 L.Ed. 793 (1877).

It is settled that the constitutional prohibition against impairment of contractual obligations is not absolute, but rather that contract rights, as all other property rights, may be altered by legislation validly enacted under the state's police power. *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 428, 434-436, 78 L.Ed. 413, 423, 426-428, 54 S.Ct. 231 (1934); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-245, 57 L.Ed.2d 727, 736-37, 98 S.Ct. 2716 (1978).

Probably the single most important factor to be considered in determining whether a particular impairment is constitutionally permissible is the nature and extent of the impairment. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at 242-244, 57 L.Ed.2d at 734-736; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 52 L.Ed.2d 92, 109-110, 97 S.Ct. 1505 (1977).

In the case at bar, when Cord created his Trust in Illinois in 1935 and later when he added the Beverly Hills property to the Trust in the 1950's (while it was still being administered in Illinois), there was no law in effect which would have authorized a court to force a sale of Trust property in the 1935 Trust in view of the Trust provision that there could be no sale by the trustee without the consent of HUMMEL. Even though the Court of Appeal has upheld the trial court and held partition is available, that does not mean that a court can constitutionally order the Property *sold* (as contrasted from *divided*) in direct contravention of the Trust provisions and in violation of the wishes of the parties to the Trust. Usually cases of this type arise because one or another of the parties to a trust want the terms of the trust changed, but in this case all parties to the Trust have consistently urged that the Property not be partitioned, let alone sold.

There is no policy of the law violated by following the express language of the 1935 Trust because upon HUMMEL'S death, the Trust assets are distributed to all of the beneficiaries. Since the Property is marketable, the prohibition against sale without HUMMEL'S consent is not an illegal restraint on alienation. There is no other public policy of the State involved, and thus a court-ordered sale simply aids Respondent's efforts to acquire property held by the Cord family for 33 years to the detriment of HUMMEL and the other trust beneficiaries.

B. If the Real Property Contained in the 1935 Cord Trust Is Sold, the Trust Corpus Will Be Depleted Because of Horrendous Tax Consequences.

In the case at bar, the impairment of the contract is substantial and any suggestion to the contrary is simply wrong. The 1935 Trust is a valuable resource for estate planning for the HUMMEL family because it pre-dates the effective date of the generation-skipping tax. The generation-skipping tax does not apply to generation-skipping transfers from a trust that was irrevocable on June 11, 1976, except to the extent that the transfer is made from corpus added to the pre-existing irrevocable trust by any person after June 11, 1976. INTERNAL REVENUE REGULATIONS, § 26.2601-1(b)(1)(i). Application and accumulated income will not be considered additions to the corpus except to the extent that the appreciation or accumulated income results from prior non-exempt additions to the corpus. INTERNAL REVENUE REGULATIONS § 26.2601-1(a)(5).

Basically what the generation-skipping tax does is to impose a tax upon the death of an income beneficiary of a trust which is equivalent to the tax which would have been paid had the corpus of the trust been included in the taxable estate of the income beneficiary. Thus, for example, if the Trust had been created in 1977 instead of 1935, the entire

corpus of the 1935 Trust with respect to which HUMMEL is entitled to income would be included in her estate when she dies as if she owned it. This, of course, is not the case with trusts such as the 1935 Trust, irrevocable on June 11, 1976.

Because of the fact that the 1935 Trust is a valuable resource for estate planning purposes, it is not in the best interests of the HUMMEL family that the corpus of that Trust be diminished by the payment of income taxes. To the extent that income taxes are reduced or eliminated, additional funds are available for investment. These funds, as well as the growth attributable to these funds, will pass free of estate tax to HUMMEL'S issue. If, on the other hand, the funds are used to pay income tax, then not only those funds but, more importantly, the growth of those funds will not be available for HUMMEL'S issue.

Naturally, it can always be said that funds paid for income taxes will not be available for inheritance by future generations. However, even though this is always undesirable from an estate planning point of view, it is particularly undesirable when the funds paid as income taxes, and future growth on those funds, would pass to future generations free of federal estate tax.

In the case at bar, if HUMMEL had sold her 15% interest for the \$510,000 paid to each of the other beneficiaries for their 15% (which HUMMEL contends is way below market value), the tax to HUMMEL would have been approximately \$165,000. Even though HUMMEL is a Nevada resident, California state tax would have to be paid. Revenue and Taxation Code Section 17953 provides:

"Income of estates and trusts distributed or distributable to nonresident beneficiaries is income from sources within this State only if distributed or distributable out of income of the estate or trust derived

from sources within this State. For the purposes of this section, the nonresident beneficiary shall be deemed to be the owner of intangible personal property from which the income of the estate or trust is derived."

HUMMEL chose, as investment consultant, to not incur this liability and to accumulate the asset for her children. This is an act of someone not selfishly accumulating and spending cash for "her" benefit as she could do under the terms of the 1935 Trust, but rather of someone using her love for her children and business sophistication to provide for her children by keeping an appreciating asset. As investment consultant she has that right which would be negated by a court-ordered partition sale.

A sale of the Property causes every party to the 1935 Trust to suffer a loss they don't want. Thus, Code of Civil Procedure Sections 872.820 and 872.840 cannot be constitutionally used to allow a court to order the trustee to sell the Property, and the Court of Appeal's decision allowing this is wrong and must be overturned.

C. Forcing the Trustee of the 1935 Cord Trust to Sell Real Property Contained in the Trust Is Contrary to the Express Terms of the Trust and Violates Substantive Due Process.

HUMMEL'S and the other beneficiaries' rights under the 1935 Trust cannot be revoked and thus are vested. The 1935 Trust is irrevocable and thus application of Sections 872.820 and 872.840 which in any way alters or abrogates those rights violates the due process clauses of the United States Constitution. *Allied Structural Steel Co. v. Spannaus, supra; United States Trust Co. v. New Jersey, supra.* See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 697 (1960).

In the case at bar, there is no interest of the State that is advanced by forcing the 1935 Trust to sell the Property. The Property is freely marketable, and a division in kind will allow the Trust to keep its corpus intact without adverse financial consequences. On the other hand, a sale only benefits Respondent and causes immediate harm to the Trust and thus constitutes a taking without due process because the court's decision will give precedence to the alleged rights of a co-tenant to force a partition sale over a pre-existing contractual right allowing HUMMEL to prohibit a sale of Trust property without her consent.

II.

THE RELAXED STANDARD AS TO WHEN PARTITION BY SALE IS ALLOWED, AS PROVIDED IN CALI- FORNIA CODE OF CIVIL PROCEDURE SECTIONS 872.820 AND 872.840 ADOPTED IN 1976, CANNOT BE CONSTITUTIONALLY APPLIED TO THE 1935 TRUST.

At the time E. L. Cord placed the Property in trust, the law in effect at the time in California required that the party seeking partition by sale (if the remedy of sale was available) had the burden of showing that partition by physical division would cause "great prejudice" to the owners. Great prejudice had to be shown without resort to unproved facts or judicial notice. Respondent presented *no* evidence that great "prejudice" would result if the Property were physically divided and thus did not meet its burden of proof. No one disputes this.

The 1976 revision of the partition statute relaxed the standard for allowing the sale of Property (if sale is available, which Petitioners deny) by providing that a court can order a sale if a sale is "more equitable" to the owners. Code of Civil Procedure §§ 872.810 and 872.820. It is HUMMEL'S position that the 1976 Code revision can-

not affect the rights of parties to the 1935 Trust, and any attempt to use the more relaxed standard would be unconstitutional.

The Court of Appeal's opinion states that the retroactive application of Code of Civil Procedure Sections 872.820 and 872.840 to Petitioners, which allowed the more equitable standard to be used, simply changed the nature of remedy involved and was not unconstitutional. This statement is clearly erroneous and contrary to holdings of this Court. *See Edwards v. Kearzey, supra.* The characterization of the relaxed standard as a remedy, even if true, does not remove it from constitutional protection under the United States Constitution.

The Court of Appeal, by authorizing the use of the "more equitable" standard, has allowed property vested in the Trust to be removed from that Trust against the wishes of all of the parties to the Trust. Therefore, the application of the "more equitable" standard is an impairment of the obligation of contract and the taking of property without due process law because Petitioners' pre-existing contract rights have been impaired by granting Respondent the right to compel a sale.

CONCLUSION

It is essential that this Court grant certiorari in this case. Many of the cases the Court hears deal with broad issues of social importance, the determination of which affect millions of people. This case does not fit that mold but does represent an attempt by a state to use its laws to impair pre-existing contract rights. The State of California has no just reason to interfere with the 1935 Trust, and their attempt to do so is such a flagrant violation of Article I, Section 10 and the due process clause that certiorari must be granted in order to prevent this.

For all of the above stated reasons, Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JONES, MAHONEY & BRAYTON
PAUL M. MAHONEY

Attorneys for Petitioners

APPENDIX A

Superior Court of the State of California for the County of Los Angeles Douglas A. Scott, *Plaintiff*, vs. L, INC., et al., *Defendants*. MONT PELERIN CORPORATION, N.V., *Intervenor*, vs. VIRGINIA KIRK CORD, et al., *Defendants in Intervention AND RELATED CROSS-ACTIONS*.

No. EAC 25905 NOTICE OF TENTATIVE DECISION (C.C.P. 632).

The court concludes from all of the evidence and the law that Mont Pelerin is entitled to an interlocutory decree for partition.

The court agrees with the position of Mont Pelerin urged in its trial brief. Generally, amongst co-owners of property, partition is a matter of right. In this case, the improved real property is not capable of physical division. It must be sold pursuant to the statutory partition procedures.

In this case, there is no defense to partition. There is no express prohibition in any of the controlling documents. No express waiver of the partition remedy exists, and none can be implied from any of the documents, nor from the other evidence.

Hummel makes much of the argument based on the trust provision concerning the "investment consultant." The court draws a different conclusion from that urged by Hummel. Said provision was designed to give each beneficiary greater control and therefore greater alienability of any trust property. E.L. Cord wanted to minimize taxation. He used the trust vehicle to accomplish his purpose. Yet, he wanted to restrain the power of the trustee (a necessary evil in good estate planning) and used the "business consultant" technique to give the beneficiaries effective control of their property without defeating the tax planning.

As Mont Pelerin argues, E.L. Cord *could* have imposed restraints on alienation but chose not to do so. Hummel,

at the outset of the trial introduced evidence of Cord's business acumen. The court concludes that Cord was a brilliant, successful, and planning business man. This conclusion supports the court's view that a prohibition of the partition remedy cannot be implied.

There is no evidence of law to support the claim that Mont Pelerin should be estopped from obtaining partition. The corporation did nothing it was not entitled to do, and Hummel did not rely on any conduct by Mont Pelerin to her detriment.

The fact that a sale pursuant to the partition decree will cause adverse tax consequences to Hummel is no defense. *Richmond v. Doffmeyer*, 105 CA3d 745, does not support her position. The fact that the court can conclude that the trusts were part of a tax saving intention on Cord's part cannot be used as an argument against partition.

The court has examined the two additional cases cited by counsel for Hummel in closing argument (*Stoner v. Nethercutt*, 8 CA3d, 667, and *MacFarlane v. Peters*, 103 CA3d, 627), and they do not support her position.

The suggestion by Scott that partition is not necessary because the court can order the receiver to sell the property is rejected. The receivership is an interim procedure that does not go to the substantive rights of the parties.

Counsel for Mont Pelerin shall prepare an Interlocutory Judgment in accordance herewith.

DATED: May 3, 1982

LESTER E. OLSON
Judge of the Superior Court

APPENDIX B

DE CASTRO, WEST & CHODOROW, INC., RICHARD W. HICKS, 10960 Wilshire Boulevard, Suite 1800, Los Angeles, California 90024, Telephone: (213) 478-2541, Attorneys for Plaintiff in Intervention, Mont Pelerin Corporation, N.V.

Superior Court of the State of California, for the County of Los Angeles. Douglas Scott, Plaintiff, v. L. INC., FIRST NATIONAL BANK OF NEVADA, et al., Defendants. MONT PELEIRN CORPORATION, N.V., Intervenor, v. VIRGINIA KIRK CORD, et al., Defendants in Intervention, and Related Cross-Complaint.

Case No. EAC 25905 Transferred to Central District, Interlocutory Judgment of Partition.

This matter came on for Trial on March 31, 1982, in Department 31 of the above Court, the Honorable Lester E. Olson, Judge presiding. Plaintiff in Intervention, Mont Pelerin Corp., N.V., was represented by Richard H. Hicks of the law firm of De Castro, West & Chodorow, Inc. Defendant in Intervention, Douglas A. Scott, was represented by Albert S. Scott, Jr. Defendant in Intervention, Leonard B. Olinger, was initially represented by Frederick L. Spinrad and thereafter by Leonard B. Olinger in propria persona. Defendants in Intervention, Sally Cord Hummel, Errett L. Hummel, Peter Russell Kirk Hummel, Security Bank of Nevada and Seck & Co., were represented by Paul M. Mahoney of the law firm of Jones, Mahoney & Brayton. The complaint of Douglas Scott was dismissed prior to commencement of the Trial. The cross-complaint of Sally Cord Hummel, et al., was severed by order of the Court. The cause of action for partition of real property raised by the complaint in intervention was tried before the Court, sitting without a jury, commencing on Wednesday March 31, 1982, and was completed on Tuesday, April 6, 1982. The Court having taken the matter under submission on

April 6, 1982, and having rendered its tentative decision on May 3, 1982, in favor of the Intervenor, Mont Pelerin Corp., N.V., entered its interlocutory judgment on June 3, 1982.

Thereafter, defendants in intervention filed a motion for a new trial and a motion to vacate the judgment and enter a new and different judgment, which motions came on for hearing in Department 31 of the Court on July 21, 1982. The Court having denied the motion for a new trial, and having granted, in part, the motion to vacate the judgment and enter a new and different judgment, now enters its interlocutory judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff in Intervention, Mont Pelerin Corp., N.V., is entitled to have the real property that is the subject of this action (subject to paragraph 3 hereof), any leasehold interests in the property (except for subsurface oil and gas leases) and all personal property located at the property partitioned.
2. The real property that is the subject of the complaint in intervention, which is to be partitioned in accordance with the terms of this interlocutory judgment (subject to paragraph 3 hereof), is legally described as follows:

Parcel 1:

Lots 747 to 750 inclusive of Tract No. 7710, in the City of Beverly Hills, County of Los Angeles, State of California, as per map recorded in book 83, pages 94 and 95 of Maps, in the office of the County Recorder of said County, together with the northwesterly half of that portion of that certain alley, 15 feet wide, as shown on said map, bounded southwesterly by the southeasterly prolongation of the

southwesterly line of said lot 747 and bounded north-easterly by the southeasterly prolongation of the northeasterly line of said lot 750.

Parcel 2:

Lots 755 and 761 inclusive of Tract No. 7710, in the City of Beverly Hills, County of Los Angeles, State of California, as per map recorded in book 83, pages 94 and 95 of Maps, in the office of the County Recorder of said County, together with the southeasterly half of that certain alley, 15 feet wise, as shown on said map, bounded southwesterly by the northwesterly prolongation of the southwesterly line of said lot 761, and bounded northeasterly by the northerly prolongation of the easterly line of said lot 755.

3. The property to be partitioned shall not include any of the following described property interests, which are specifically excluded from this order of partition and reserved to the present owners thereof: "All oil, gas, mineral, hydrocarbon and related substances located on, under or otherwise effecting the property below a depth of five hundred feet under the real property described herein, without the right of surface entry".

4. Title to the property that is subject to this Interlocutory Judgment for Partition is held as follows:

<u>Title Holder</u>	<u>Percentage</u>
Douglas A. Scott, a single man, and Albert S. Scott, Jr., a married man, as joint tenants	2%
Leonard B. Olinger	5%
Mont Pelerin Corp., N.V.	69%

<u>Title Holder</u>	<u>Percentage</u>
Seck & Co., a co-partnership, as nominee of Security National Bank of Nevada, Trustee for Errett Alan Hummel Trust, Edgar Stephen Hummel Trust, William Cord Hummel Trust, Peter Russell Kirk Hummel Trust, Robert Errett Arrington Trust, Virginia, Michelle Hummel Arrington Trust, and Sally Cord Hummel Trust	24%
TOTAL	100%

5. A sale of the property as a single parcel would be more equitable to the parties than a division of the property, or a partial division of the property, and it is therefore ordered that the property shall be sold in accordance with the applicable provisions of the California Code of Civil Procedure relating to actions for partition (C.C.P. §872.010, *et seq.*).

6. Sidney Landis is appointed Referee to conduct the sale of the property and to report to the Court on the completion of the sale. The Referee shall post a bond in the amount of \$100,000.00, within seven days of any proposed sale of the property that is the subject of the partition sale.

7. The sale shall be by public auction, conducted in such manner as the Referee shall judge to be most beneficial to the parties' interest. Parcels 1 and 2 and the real and personal property shall be sold as a unit.

8. The sale shall be a cash sale with the successful bidder paying ten percent (10%) of the purchase price down at the time of bidding, the balance to be paid at the close of escrow. The escrow shall be opened on such terms as the Referee shall judge to be most beneficial to the parties' interest.

9. In the event that any of the owners of the Property become the purchasers of the property at the time of sale, said owners may use their percentage ownership interest in the property as an offset against the total purchase price.

10. The proceeds of sale, after deducting the costs of sale and the fee for the Referee, as approved by the Court, shall be invested by the Referee in State of California or United States Government obligations or interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government for the benefit of the parties hereto, subject to an accounting between the parties and subject to further order of the Court.

11. The Court reserves until the time for entry of a final judgment, the determination of the allocation of all other costs of partition, including attorneys' fees. The Court also reserves jurisdiction to modify, change or supplement the provisions of paragraphs 6 and 10 upon showing as is deemed appropriate, for such time as is permitted by law.

DATED:

LESTER E. OLSON

Judge of the Superior Court

APPENDIX C

In the Court of Appeal of the State of California, Second Appellate District, Division Four. Mont Pelerin Corporation N.V., *Plaintiff and Respondent*, v. Sally Cord Hummel, et al., *Defendants and Appellants*. 2d Civil No. 70081 (Super. Ct. No. EAC 25905).

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester E. Olson, Judge. Affirmed.

Jones, Mahoney & Brayton and Paul M. Mahoney, for Defendants and Appellants Sally Cord Hummel, Security Bank of Nevada, Seck & Co., Peter Russell Kirk Hummel and Errett Allan Hummel.

Albert S. Scott, Jr., for Defendant and Appellant Douglas A. Scott.

De Castro, West & Chodorow, Inc., Richard H. Hicks and Steven B. Jacobson, for Plaintiff and Respondent.

Defendants in intervention, Sally Cord Hummel, Security Bank of Nevada, Seck & Co., Peter Russell Kirk Hummel, Errett Alan Hummel and Douglas A. Scott, appeal from the interlocutory judgment of partition entered on July 28, 1982.¹

¹An interlocutory judgment of partition is appealable. (Code Civ. Proc., § 904.1, subd. (i).) All appellants except Scott purport to also appeal from the minute order denying their motion for new trial and partially denying their motion to vacate the judgment. The order denying the motion for new trial is not appealable and to the extent the motion to vacate the judgment was denied, it too is not appealable. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 871.) Accordingly, to the extent appellants purport to appeal from these orders, their appeal is dismissed.

Mont Pelerin asserts that the appeal should be dismissed in regard to Peter Hummel, Errett Hummel and as to Security Bank and Seck to the extent they are trustees of those individuals' trusts, because appellants in their opening brief argue only with respect to Sally Hummel's right to prevent a partition. For the same reason, Mont Pelerin asserts that the appeal of Douglas Scott who joined in the other appellants' brief should also be dismissed. Because we affirm the judgment we need not, and do not, address this assertion.

The judgment was on the complaint for partition of real property of plaintiff in intervention Mont Pelerin Corporation. The real property which is the subject of that complaint is the Beverly Hills Medical Building located at 133 Lasky Drive in Beverly Hills. The judgment entitled Mont Pelerin to have the subject real and personal property partitioned subject to any leasehold interest and excepting subsurface oil and gas rights. The court determined that the property should be sold with a division of the proceeds rather than having the property physically divided.

CONTENTIONS

Appellants raise the following six contentions on appeal:

“1. Under California law, respondent, as a successor in interest to the beneficiaries of the 1935 trust from whom it purchased its interest in the property, is subject to the same prohibition of the right to partition as existed against the original beneficiaries of the 1935 trust.

“2. Under California Law, a beneficiary of an active express trust containing real property, such as the 1935 Trust, has no right to partition said trust property unless all beneficiaries agree.

“3. Even if under some circumstances an active trust containing real property can be partitioned, the 1935 trust instrument prohibits partition and sale of individual trust interests without the consent of the beneficiary of that interest. The trial court, by holding to the contrary, has rewritten the terms of the 1935 trust and added terms inconsistent with its meaning and intent and caused harm to appellants not intended by the creator of the trust.

“4. Evidence in addition to the language of the 1935 trust instrument compels the conclusion that the trust property in question cannot be partitioned.

"5. Even if partition is allowed in this case, there is insufficient evidence to support the trial court's order that the property be sold rather than divided. To order it sold would defeat the legitimate economic expectations of appellants and cause horrendous and unwarranted tax consequences.

"6. The trial court's orders contained in paragraphs 5 through 10 of the interlocutory judgment are inappropriate at this time and should be vacated because there was no evidence before the court upon which it could base the orders contained in said paragraphs."

FACTS

The evidence adduced at trial demonstrates that on August 21, 1935, E. L. Cord, created a \$100,000 inter vivos trust naming himself as trustee. This trust contained four, \$25,000 accounts with each account designated for one of four beneficiaries. These beneficiaries were his daughters Sally Cord Hummel and Nancy Phelps, his wife, Virginia Cord, and his son, Charles Cord.

On October 18, 1948, E. L. Cord executed an "appointment of new trustee under trust indenture" designating the First National Bank of Chicago as the successor to E. L. Cord as trustee for the 1935 trust. That document also provided that "[e]ach beneficiary of a trust fund who is now, or who shall hereafter become, twenty-five (25) or more years of age shall be and is hereby appointed Investment Consultant of his or her trust fund. . . . [¶] The Trustee shall not at anytime or times, whether or not there is an Investment Consultant or Consultants qualified and acting as hereinabove provided, make any sale or investment of any property or money comprising any trust fund, except upon the written approval of such Investment Consultant or Investment Consultants. . . ." This provision gave each beneficiary control over their individual trust accounts.

In January 1951, E. L. Cord acquired title to the subject Beverly Hills real estate. A medical clinic and a parking lot were located on the property. Three to four years later, he acquired three lots which are contiguous to the subject parcel but are not subject to this action.

On March 1, 1955, he placed the subject property into a land holding trust with Coll Gillies as trustee (hereafter Gillies' trust). Each of the four subtrusts of the 1935 trust was given a 10 percent beneficial interest in the Gillies' trust. A 10 percent beneficial interest was also given to a trust established for Susan Pereira and a trust established for Christopher Cord. A 1 percent beneficial interest was given to trusts established for Meredith Lawrence, Gene Quinney and Katherine Olinger. E. L. Cord was the beneficial owner of the remaining 37 percent. In May of 1956, Cord transferred an additional 5 percent beneficial interest in the subject property to each of the four beneficiaries of the 1935 trust and to the Pereira trust. He transferred a 3 percent interest to the Charles Cord, II trust, the Joanne Cord Davis trust and to Lola Mae Thorpe Smith. This left E. L. Cord with a 3 percent beneficial ownership in the subject property.

The Gillies' trust originally provided that the beneficial owners of 66 $\frac{2}{3}$ percent interest in the property had the power to give the trustee instructions regarding the management and control of the trust property.

On September 19, 1969, William K. Stevens, who had been acting trustee of the Gillies' trust resigned and the First National Bank of Nevada (hereafter FNB) was appointed as successor trustee. FNB also became the successor trustee of the 1935 trust at approximately the same time. United California Bank (hereafter UCB) was appointed subtrustee to hold title of the land in California.

In 1968 or 1969, E. L. Cord formed C. Inc. In 1970, he transferred to it the three lots which are contiguous to the subject property. At approximately this same time, E. L. Cord formed L. Inc. In 1973, C. Inc. replaced UCB as the legal title holder of the subject trust property. In 1976, it was replaced in this function by L. Inc.

On March 5, 1973, FNB executed a lease and management agreement with L. Inc. whereby L. Inc. agreed to manage the medical clinic. Charles Cord, as an officer of L. Inc., was primarily responsible for managing the clinic. Ed Neuhoff, E. L. Cord's longtime attorney, was also an officer of L. Inc.

In January 1974, E. L. Cord died, leaving in his estate the 3 percent beneficial ownership of the subject property. Also left in his estate was the stock of C. Inc. which in turn held title to the three contiguous lots.

On March 1, 1976, the Gillies' trust expired by its own terms and the legal title to the subject property was transferred to the beneficial owners under that trust. In 1976, the officers of L. Inc. decided that they no longer wanted to manage the subject property due to the dissention among the beneficiaries. FNB as the holder of legal title to the subject property purchased the stock of L. Inc. on behalf of the beneficial owners. Mr. Gardner and Mr. Ponton, two of the trust officers at FNB, became officers of L. Inc. and took over the responsibility of managing the subject property.

At about this time, several of the beneficiaries of the various trusts owning an interest in the subject property expressed their desire to sell their interest in the property. Several offers to buy the property were rejected. Mrs. Hummel did not want to sell but indicated that she might exchange her interest for an interest in other property, in order to avoid adverse tax consequences.

On March 8, 1978, Mont Pelerin Corporation agreed to purchase a 34 percent interest in the subject property. On March 20, 1978, it agreed to purchase an additional 31 percent interest. In both of these purchase agreements, Mont Pelerin included an addendum which provided that the "[s]eller has no information or knowledge of any written or oral agreement relating to the portion of the Beverly Hills Medical Building or any portion thereof being sold hereby which would prohibit or in any way impede a court-ordered partition of the Beverly Hills Medical Building or any portion thereof, either in kind or by a court-ordered sale." The beneficial owners of the trust property sold gave similar warranties individually to Mont Pelerin. Title to the 65 percent interest in the property encompassed by the above two agreements was transferred to Mont Pelerin on May 4, 1978.

In March of 1978, Mont Pelerin acquired the three contiguous lots to the subject property by purchasing all of the stock of L. Inc. which held title to that property. In March 1979, Mont Pelerin acquired an additional 4 percent interest in the subject property bringing its total in the subject property to 69 percent.

The remaining interest holders in the property refused to sell. At the time of trial, the remaining 31 percent was owned as follows: Sally Hummel's interest in the 1935 trust owned 15 percent, William Cord Hummel beneficially owned 1½ percent, Errett Allan Hummel beneficially owned 1½ percent, Peter Russel Kirk Hummel beneficially owned 2 percent, Virginia Michele Hummel Arrington beneficially owned 2 percent, Robert Errett Arrington beneficially owned 1 percent and Edgar S. Hummel beneficially owned 1 percent. Legal title to this 24 percent was held by Seck & Co., the nominee of Security National Bank of Nevada, the trustee of the various trusts holding beneficial interests in the property. The remaining interest

owned was 5 percent by Leonard Olinger, a nonappellant and 2 percent by Douglas Scott and Albert Scott as joint tenants. Albert was not a party to this action but has stipulated that he is bound by any partition the court orders.

In 1977, prior to Mont Pelerin's acquisition of its interest, Douglas Scott filed suit against FNB, UCB and L. Inc. alleging mismanagement of the trust property. In November 1978, Mont Pelerin filed its complaint in intervention for partition. Mrs. Hummel, Peter and Errett Hummel cross-complained against FNB alleging mismanagement of the 1935 trust and breach of fiduciary duty. The Hummel and Scott actions were severed and the partition action proceeded to trial first.

DISCUSSION

Under California law,² the owner of a concurrent estate in real property is entitled to have that property partitioned unless that owner is barred by a valid express or implied waiver of that right. (Code Civ. Proc., § 872.710, subd. (b); *American Medical International, Inc., v. Feller* (1976) 59 Cal.App.3d 1008, 1014-1015; *Pine v. Tiedt* (1965) 232 Cal.App.2d 733, 738; Annot., Contractual Provisions as Affecting Right to Judicial Partition (1971) 37 A.L.R.3d 962.) An action for partition is equitable in nature and subject to estoppel and other equitable defenses. (*Thomas v. White* (1963) 214 Cal.App.2d 322, 326; *American Medical International, Inc. v. Feller, supra*, 59 Cal.App.3d 1008, 1013.) A successor in interest to a concurrent estate is generally bound by a valid waiver of partition by his trans-

²Because this action concerns California real property, California law governs despite the fact that it also involves the interpretation of a trust which was created in Illinois. (7 Witkin, *Summ. of Cal. Law* (8th ed. 1974) *Trusts*, §§ 5-7, pp. 5370-5371.)

feror. (59 Cal.App.3d at p. 1021; *Harrison v. Domergue* (1969) 274 Cal.App.2d 19, 21-23.)

When a concurrent estate in real property is the subject of an active trust, partition is prohibited if its effect would be to prematurely terminate that trust or if it would defeat the purpose of that trust. (48 Cal.Jur.3d Partition, § 31, pp. 269-270; Annot., Right To Cestui Que Trust (Or One Claiming Through Or Under Him) To Maintain Suit For Partition (1940) 126 A.L.R. 1009.) The mere fact that the property is the subject of a trust, however, does not preclude partition.

I

Appellants first contend that "under California law, a beneficiary of an active express trust containing real property, such as the 1935 trust, has no right to partition said trust property unless all beneficiaries agree."

Appellants urge that a beneficiary of an active trust cannot seek partition of the trust property and thereby prematurely terminate the trust. The authorities upon which appellant relies in support of this contention concern situations where a beneficiary of a trust seeks to use a partition action to separate his interest from those of his co-beneficiaries resulting in a premature termination of that trust.

In the case at bench, to the extent Mont Pelerin obtained an interest in the subject property from the beneficiaries of the 1935 trust it received the legal title as well as the beneficial title to that property. Those beneficiaries were expressly given the right to deal with their trust property independently of the other beneficiaries. Each beneficiary who sold an interest warranted that he or she knew of no impediment to a partition of the property. Appellants do

not challenge the propriety of Mont Pelerin's acquisition of its interest in this action.

There is no evidence in the record that the partition of the subject property will result in the premature termination of the 1935 trust. At most, appellants will be forced to sell their interest in the subject property, an act which they were allowed voluntarily to do by the express terms of that trust. The judgment of partition will result in a division of a piece of the property in the trust corpus, it will not result in an alteration of the structure of the trust. Mont Pelerin is also a co-tenant by reason of its acquisition of a substantial portion of its interest in the subject property from sources other than the 1935 trust and its right to partition cannot be foreclosed by reason of that 1935 trust. This contention is, therefore, rejected.

II

Appellants next contend that "[e]ven if under some circumstances an active trust containing real property can be partitioned, the 1935 trust instrument prohibits partition and sale of individual trust interests without the consent of the beneficiary of that interest. The trial court, by holding to the contrary, has rewritten the terms of the 1935 trust and added terms inconsistent with its meaning and intent and caused harm to appellants not intended by the creator of the trust."

Within this contention, appellants focus on that portion of the 1948 amendment to the 1935 trust providing that the beneficiaries as investment consultants, must give their written approval before the trustee could make any sale of the trust property. Appellants assert that the partition of the subject property will defeat the purpose of this provision because it will usurp their exclusive power to deal with their trust property.

In its tentative decision, the trial court determined that E. L. Cord made the beneficiaries of the trust established in 1935 investment consultants in order to give them greater control over their trust property without defeating the tax planning benefits of a trust. The trial court further determined that if E. L. Cord, as a brilliant businessman, had wanted to prohibit the partition of any of the property held in trust, he would have expressly provided as such. We agree.

The waiver of the right to partition of a co-owner of real property will typically be implied in a contract or trust where the partition of the property would defeat the purpose for which the property was acquired. In *Pine v. Tiedt, supra*, 232 Cal.App.2d 733, the court held that partition was improper because it would defeat the purpose behind the investors' acquisition of the property, which was to operate an ongoing enterprise. In *Miranda v. Miranda* (1947) 81 Cal.App.2d 61, the court held that partition would defeat the purpose of the parties' agreement which provided that the defendant was entitled to occupy the premises as long as she remained unmarried and lived in the premises with her children.

Partition will also be denied if its effect would be to unfairly defeat the legitimate expectations of a party under a contract. In *Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238, 253, the parties, as co-owners of a parcel of real property, had agreed to give each other the right to purchase the others' interest in the property at the original purchase price prior to any sale of that interest to a third party. The court held that to allow the plaintiff to obtain partition without first offering defendants the right to purchase their interest at the price specified would permit a circumvention of that contractual obligation. Accordingly, the court disallowed the partition of the property. (See also *Penasquitos, Inc. v. Holladay* (1972) 27 Cal.App.3d 356, 358-395.)

In the case at bench, the clause providing that the trustee must obtain the consent of the beneficiaries in their role as investment consultants prior to the trustee's disposition of trust property is not circumvented by the partition of trust property at the request of a non-beneficiary party who owns a separate interest in that property. That clause gave greater control of the trust corpus to the beneficial owners of the trust property. There is no evidence it was intended as a restriction on the rights of non-beneficiary co-owners of property that was held in that trust to obtain a partition. Nor is there any evidence in the record that the continued co-ownership of the subject property was necessary to preserve the purpose of that trust. The fact that appellants may suffer adverse financial consequences as a result of the partition is not sufficient by itself, to prevent Mont Pelerin from enforcing their right to a partition. (*De Roulet v. Mitchel* (1945) 70 Cal.App.2d 120, 124.) We, therefore, reject appellants' contention in this regard.

III

Appellants next contend that "[e]vidence in addition to the language of the 1935 trust instrument compels the conclusion that the trust property in question cannot be partitioned." Appellants assertions with regard to this contention are without merit. First the belief of the co-beneficiaries under the 1935 trust that they had control over their trust assets is not an indication that that trust itself restricted partition of trust property.

Secondly, the provision in the management agreement, concerning the subject property between FNB and L. Inc., that that agreement would terminate upon the sale of the premises is no indication that the subject property was to be sold only as a whole. This is apparent, especially in light of the appellants' recognition that the co-beneficiaries had a right independent of the other co-beneficiaries to dispose

of their interest in that property. Further, Mont Pelerin's request that FNB not lease the property without its consent pending the consummation of its purchase of an interest in that property is not, as appellants contend, sufficient to demonstrate Mont Pelerin's bad faith. Finally, the 1935 trust provision that a majority of the beneficiaries is necessary to remove the trustee is not, as appellants contend, inconsistent with the partition of property, an interest in which is held in part in the corpus of that trust.

IV

Appellants' next contention is that "[e]ven if partition is allowed in this case, there is insufficient evidence to support the trial court's order that the property be sold rather than divided. To order it sold would defeat the legitimate economic expectations of appellants and cause horrendous and unwarranted tax consequences."

Code of Civil Procedure section 872.820 provides in pertinent part: "[T]he court shall order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations: ... [¶] (b) The court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property...." Code of Civil Procedure section 872.840 provides in pertinent part: "(a) Where the property or an interest therein is subject to an express trust, the court may, in its discretion, order that the property be sold. [¶] Upon division or sale of such property, the property or proceeds of sale allotted to the trustee of the express trust shall be held by him upon the trust therein stated,..."

In 1976, the Legislature amended California's partition provisions. "The former sections provided for divisions by

sale only where physical division would cause 'great prejudice' to the parties. The new provisions provide for a presumption in favor of physical division which will control in the absence of proof that under the circumstances sale would be 'more equitable' than division." (*Butte Creek Island Ranch v. Crim* (1982) 136 Cal.App.3d 360, 365.)³ Code of Civil Procedure section 872.840, giving the trial court discretion to order the sale of trust property involved in a partition action, does not change the preference for partition in kind. (See *Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745, 757; Cal. Real Property Remedies Practice (Cont.Ed.Bar 1982) § 8.13, pp. 266-267.)

In the interlocutory judgment of partition, the court determined that "[a] sale of the property as a single parcel would be more equitable to the parties than a division of the property, . . ." Appellants failed to request a statement of decision by the trial court and, therefore, waived their right to one. "Accordingly, we must presume in favor of the judgment every finding of fact necessary to support it warranted by the evidence (citation)." (*Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 984.)

Respondent urges that the current use of the property is not its best use and that an appropriate development of

³Appellants assert, without citation of authority, that the application of the 1976 California partition act which relaxes the standard for partition by sale (Code Civ. Proc., § 872.820) would be unconstitutional because they own their interest in the subject property pursuant to a 1935 trust. The Legislature clearly intended this act to apply to suits commenced after the effective date of the act. (See Stats. 1976, ch. 73, p. 110.) To the extent that it is claimed that this results in a retroactive application of the act to appellants, we observe that the act simply changes the nature of the remedies involved and is not unconstitutional. (See 5 Witkin, *Summ. of Cal. Law* (8th ed. 1974) *Const. Law*, § 285, pp. 3574-3575.)

the property requires the whole parcel. Mont Pelerin refers to evidence showing they would build a hotel on the property if it acquired the entire parcel. Respondent also urges that the multiple number of joint owners makes physical partition impractical.

"There are two types of evidence which have been held sufficient to justify a partition sale property rather than a physical division. The first is evidence that the property is so situated that a division into subparcels of equal value cannot be made. . . . [¶] The second type of evidence which supports a partition sale rather than physical division is economic evidence to the effect that, due to the particular situation of the land, the division of the land would substantially diminish the value of each party's interest." (*Butte Creek Island v. Crim, supra*, 136 Cal.App.3d 360, 366-367.)

The mere fact that there are multiple interest holders in the land does not conclusively establish that an appropriate division cannot be made. We need not decide whether the first test was met since we find that there was sufficient evidence, under the second test set forth in *Butte* to support the trial court's judgment. The evidence as to the location and character of the land was itself evidence supporting the trial court's exercise of its sound discretion to order the sale, as was the evidence of the size of the property and the kind of improvements and their location on the property. It is obvious from the evidence adduced that the economic value of the land and the value of each party's interest therein would be substantially diminished by its division.

V

Appellants' last contention is that "[t]he trial court's orders contained in paragraphs 5 through 10 of the inter-

locutory judgment are inappropriate at this time and should be vacated because there was no evidence before the court upon which it could base the orders contained in said paragraphs."

In support of this contention appellants' total argument is that "[t]here was no evidence before the trial court that a private sale is better than a public sale, that the bond is sufficient, that a 10% down payment is sufficient, etc. It would be much more appropriate to have a referee (*if* the case is affirmed on appeal) report to the court as the best manner of partitioning the Property. [¶] Also, the trial court's order totally obliterates the 1935 Trust's rights under *Richmond v. Dofflemyer* [(1980) 105 Cal.App.3d 745] to be able to work out a tax-free exchange. Paragraph 9 of the proposed judgment talks about the proceeds of sale and is totally inappropriate at this time."

Of course, portions of that argument unsupported by references to the record or the law require no further statement. To the extent that they are, it is sufficient to state that the judgment is interlocutory, that it provides for a "public" auction, that the trial court has not foreclosed appellant's opportunity to effect a tax-free exchange. The size of the bond is a matter committed to the sound discretion of the trial court. (Code Civ. Proc., § 873.010, subd. (b)(i).) There is nothing in the record to suggest that the trial judge has, or will, abuse that discretion.

The judgment is affirmed.

McCLOSKY, J.

We concur:

Woods, P. J.

KINGSLEY, J.

APPENDIX D

D-1

Order.

In HUMMEL vs. MONT PELERIN CORP., No. 70081
PETITION FOR REHEARING DENIED. Los Angeles,
California, June 11, 1984.

CLAY ROBBINS, *Clerk*

APPENDIX E

E-1

Order.

CLERK'S OFFICE, SUPREME COURT, 4250 State Building, San Francisco, California 94102.

In re: 2 Civ., No. 70081, MONT PELERIN CORP. vs. SALLY CORD HUMMEL, et al. HEARING DENIED, July 25, 1984.

Respectfully,
Clerk

APPENDIX F

Attorneys for Defendants in Intervention SALLY C. HUMMEL, SECK & CO., SECURITY BANK OF NEVADA, PETER RUSSELL KIRK HUMMEL and ERRETT ALLAN HUMMEL.

SUPERIOR COURT of the State of CALIFORNIA for the COUNTY of LOS ANGELES. DOUGLAS A. SCOTT, Plaintiff, v. L, INC., et al., Defendants. MONT PELERIN CORPORATION, N.V., Intervenor, v. VIRGINIA KIRK CORD, et al., Defendants in Intervention. AND RELATED CROSS-ACTIONS.

No. EAC 25905 (Transferred to Central District)
ORDER FOR SUBSTITUTION OF INTERVENTION DEFENDANTS. DATE: September 14, 1984. TIME: 9:00 a.m. DEPT: 31.

WHEREAS Intervenor MONT PELERIN CORPORATION, N.V. has filed a partition action with respect to improved real property at 133 S. Laskey Drive (hereinafter referred to as the "Beverly Hills Medical Building"), and

WHEREAS the trusts which hold undivided interests in the Beverly Hills Medical Building have heretofore been administered by Defendant in Intervention SECURITY BANK OF NEVADA as trustee for the benefit of Defendants in Intervention SALLY CORD HUMMEL, PETER RUSSELL KIRK HUMMEL and ERRETT ALLAN HUMMEL and whereas VALLEY BANK OF NEVADA, a national banking association, is now the successor trustee, and

WHEREAS legal title to such undivided interests have heretofore vested in SECK & CO., a co-partnership, as nominee of SECURITY BANK OF NEVADA, and have now been conveyed to HAFTCO, a partnership, as nominee of VALLEY BANK OF NEVADA, and

WHEREAS SECURITY BANK OF NEVADA and SECK & CO. no longer have any legal or equitable interest in the Beverly Hills Medical Building;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That VALLEY BANK OF NEVADA, a national banking association, shall be substituted in the place and stead of SECURITY BANK OF NEVADA, a national banking association, as the Intervention Defendant holding undivided interests in the Beverly Hills Medical Building as trustee of trusts for the benefit of Intervention Defendants SALLY CORD HUMMEL, PETER RUSSELL KIRK HUMMEL and ERRETT ALLAN HUMMEL: and
2. That HAFTCO, a partnership as nominee of VALLEY BANK OF NEVADA, shall be substituted in the place and stead of SECK & CO., a co-partnership, as the Intervention Defendant owing legal title to said undivided interests.

DATED: September 14, 1984

LESTER E. OLSON

Judge of the Superior Court

APPENDIX G

THIS AGREEMENT, executed in quintuplicate at Chicago, Illinois as of August 21, 1935 between E. L. CORD, of Chicago, Illinois, hereinafter called the "Donor", and the said E. L. CORD, not personally but as Trustee, hereinafter called the "Trustee", and THE FIRST NATIONAL BANK OF CHICAGO, of Chicago, Illinois, hereinafter called the "Successor in Trust", WITNESSETH:

THAT, in consideration of the acceptance by the Trustee of the trusts hereby created and the payment by the Donor to the Trustee of the sum of One Dollar (\$1.00), the receipt whereof is hereby acknowledged, the Donor has assigned, transferred and delivered, and by these presents does assign, transfer and deliver to the Trustee, the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), which amount has been this day charged to the account of the Donor upon the books and records of E. A. Pierce & Company, 105 West Adams Street, Chicago, Illinois. The said sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) is hereby divided into four separate trust funds in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) each, one of said trust funds being for the benefit of Donor's daughter, NANCY VIRGINIA CORD, the second of said trust funds being for the benefit of Donor's daughter, SALLY KIRK CORD, the third of said trust funds being for the benefit of Donor's son, CHARLES ERRETT CORD, and the Fourth of said trust funds being for the benefit of Donor's wife, VIRGINIA KIRK CORD, and there has this day been opened on the books of said E. A. Pierce & Company four new accounts in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) each, representing the principal of said trust funds, one of said accounts being in the name of E. L. CORD, Trustee for NANCY VIRGINIA CORD, the second in the name of E. L. CORD, Trustee for SALLY KIRK CORD, the third in the name of E. L. CORD, Trustee for

CHARLES ERRETT CORD, and the fourth in the name of E. L. CORD, Trustee for VIRGINIA KIRK CORD. The Trustee agrees to hold, manage, invest and distribute the said trust funds for the benefit of the beneficiaries named and upon the following terms and conditions:

I.

The Trustee shall have full power:

(a) To invest any money at any time in any of the trust funds in such bonds, stocks, notes, annuities, debentures, real estate mortgages or other securities, or in such other property, real, personal or mixed, either within or without the United States, as the Trustee during his lifetime, in his sole judgment and discretion, shall approve, without being limited by any statute or rule of law of Illinois or any other state or country regarding investments by trustees; to make purchases of securities or other investments for said trusts, or any of them, from himself, from any beneficiary, or from others not interested in or parties to this agreement, for cash, or upon credit or margin; to open and maintain brokerage accounts in the names of said trusts with any broker or brokers; to borrow money in the names of and for the accounts of said trusts, or any of them, from himself, personally, or from any bank, trust company or broker, and to pledge or hypothecate any assets of said trusts as security for the repayment of such loans; and from time to time to deposit and keep on deposit the funds and securities of said trusts in any bank or trust company, or with any brokerage firm which is a member of the New York or Chicago Stock Exchange, selected by the Trustee, without any personal responsibility for any loss occasioned thereby. No one dealing with the Trustee shall have any duty to inquire into the propriety of any act of

the Trustee, or to see that any money or property paid or delivered to the Trustee is properly applied.

(b) to allot to any trust fund created hereunder an undivided interest in any property, to make joint investments for said trust funds, to transfer investments from one trust fund to another, and to make any division or distribution in kind, or partly in kind and partly in money, and to determine the value of any property so allotted, divided or distributed;

(c) to sell, at public or private sale, exchange, lease for any period of time not exceeding ninety-nine (99) years, mortgage or pledge any property, real or personal, at any time constituting a portion of the trust funds, upon such terms and conditions as the Trustee shall deem wise;

(d) to cause any security which may at any time constitute a portion of the trust funds to be issued, held or registered in his own name as Trustee, or in the name of his nominee, or in the name of any broker, or in such form that title will pass by delivery;

(e) to consent to the reorganization, consolidation, readjustment of the financial structure or sale of the assets, of any corporation or other organization, the securities of which constitute a portion of the trust funds, and to take any action with reference to such securities which, in the opinion of the Trustee, is necessary to obtain the benefit of any such reorganization, consolidation, readjustment or sale; also to exercise any conversion privilege or subscription right given to the Trustee as the owner of any security constituting a portion of the trust funds; and to accept and hold as a portion of the trust funds the securities resulting from any such reorganization, consolidation, readjustment, sale, conversion or subscription;

(f) to pay all costs, taxes, expenses and charges in connection with the administration of the trusts, including a reasonable compensation to the Trustee and to his counsel and agents, and to determine whether such payments shall be charged against principal or income;

(g) to determine what is income and what is principal hereunder;

(h) to do all other acts in his judgment necessary or desirable for the proper and advantageous management, investment and distribution of the trust funds.

II.

The principal and the net income of said trust funds shall be used and disposed of as follows:

(a) During the minority of any of said beneficiaries and, if in the judgment of the Trustee the income from his or her trust fund is not required for the support, maintenance and education of such beneficiary or beneficiaries, and in the case of the trust created for the benefit of Virginia Kirk Cord for and during the five year period ending August 21, 1940, the net income shall be accumulated and added to, considered a part of and disposed of as is herein provided with respect to the principal from which such income was derived;

(b) during the minority of any of such beneficiaries, if in the judgment of the Trustee the income from his or her trust fund is required for the support, maintenance and education of such beneficiary or beneficiaries, the net income shall not be accumulated and added to the principal of the trust fund of such beneficiary or beneficiaries, but used by the Trustee, in his sole judgment and discretion, for the support, maintenance and education of such beneficiary or beneficiaries;

(c) after any beneficiary now a minor shall attain the age of twenty-one (21) years, the net income from his or her trust estate shall be paid to him or her in quarterly installments on or about the fifteenth days of January, April, July and October of each year, and after August 21, 1940 the net income from the trust estate created for her benefit shall be paid to Virginia Kirk Cord in like quarterly installments. Such payments to each beneficiary shall continue for the balance of his or her natural life.

(d) In the event of the decease of Virginia Kirk Cord, one of the beneficiaries hereunder, the principal of the trust estate created for her benefit and all accumulated and undistributed income therefrom shall thereupon be divided equally between and become part of the other trust funds created by the Donor under this instrument, or, if any of said trusts have previously terminated, then among the remaining trusts in existence at said date. Upon the decease of any of the other beneficiaries, now minors, of the trusts hereby created, such beneficiary's trust estate shall continue if such beneficiary leaves lawful issue him or her surviving, and the Trustee shall in such event use the net income of such trust estate for the support, education and maintenance of such deceased beneficiary's lawful issue during his, her or their minority, and to that end may make payments of such net income direct to such issue, or to a legal guardian, or to a relative, to be expended for the support, maintenance and education of such issue, or may itself expend the net income for such purposes, until the youngest surviving child of said beneficiary shall attain the age of twenty-one (21) years, at which time said trust shall terminate and the principal and any undistributed income therefrom shall be divided among the then surviving lawful

issue of said deceased beneficiary. In the event of the decease of any beneficiary hereunder, other than Virginia Kirk Cord, leaving no lawful issue him or her surviving, or if such lawful issue survive the beneficiary but no one of such issue lives to attain the age of twenty-one years, such beneficiary's trust hereby created shall thereupon immediately cease and determine upon the death of the beneficiary without lawful issue or upon the death of the last surviving lawful issue of such beneficiary before attaining the age of twenty-one years and the principal of said trust estate and all accumulated and undistributed income therefrom shall thereupon be divided equally between and become part of the other trust funds created by the Donor under this instrument, if said trusts continue in existence at that date, or, if any of said trusts have previously terminated, then pro rata among the surviving beneficiaries who have received the principal of their respective trust funds, and in the event all of said trusts have terminated and all of said beneficiaries have died and no lawful issue of any beneficiary hereunder survives, then in such case any principal of said trust estates and all undistributed income therefrom shall be immediately distributed among the heirs at law and next of kin of the last surviving beneficiary in accordance with the laws of the State of Illinois relative to the distribution of the estates of intestates now in force.

III.

In the event of the death, resignation, removal or other inability to act of E. L. Cord, as Trustee, The First National Bank of Chicago, shall immediately be and become Trustee in his place and stead and shall thereupon have and receive all the titles, rights, duties and obligations discretionary and otherwise in this instrument conferred

or imposed upon said E. L. Cord, as Trustee (subject to the limitations and restrictions elsewhere herein imposed upon all successor Trustees), provided, however, that said The First National Bank of Chicago shall be in no way liable or responsible for any acts or defaults of E. L. Cord, as Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done by the said E. L. Cord, while acting as the Trustee, but shall be liable or responsible only for its own acts and defaults in respect to property actually received by it as the Trustee; and provided, further, that The First National Bank of Chicago, as Trustee, with the consent of the adult beneficiaries at the time entitled to receive income may accept the account rendered and the assets and properties delivered to it by E. L. Cord, as the Trustee, or by his legal representatives, as a full and complete discharge of E. L. Cord, as Trustee; and it shall incur no liability or responsibility to the beneficiaries of the trusts herein declared by reason of so doing. As such Successor Trustee, the said The First National Bank of Chicago shall be entitled to reasonable compensation for its services and shall be relieved of all responsibility for any loss occasioned by the holding of any investments made for said trust estates or any of them by the Trustee, E. L. CORD, in his lifetime, but thereafter in making any new investments for said trust estates shall make only such investments as are legal investments for trust funds under the laws of the State of Illinois then in force.

IV.

If and as often as the Trustee deems the same advantageous to the trusts hereunder it may by an instrument in writing appoint as Successor Trustee hereunder any trust company, wherever situate, having a capital and surplus of not less than Two Million Dollars (\$2,000,000). Upon its written acceptance of such appointment delivered to the Trustee such Successor Trustee shall thereupon have

all the titles, powers, duties, rights and discretions of the original Trustee hereunder, subject, however, to the following, namely:

- (a) Said Trustee shall act as Advisor to such Successor Trustee;
- (b) Such Successor Trustee shall invest and reinvest trust funds hereunder in such securities and property and in such manner as said Advisor shall, from time to time, direct in writing delivered to it and shall make no sales of any trust assets hereunder without the prior written approval of said Advisor;
- (c) All income and principal payments hereunder shall be made through said Advisor and such Successor Trustee shall exercise the discretionary powers granted hereunder with respect to payment of income and principal in accordance with the written direction of said Advisor; and
- (d) Such Successor Trustee may retain and hold, without incurring any liability in so doing, as investments of trust funds hereunder, any property or securities delivered to it by the Trustee or that may have been obtained by the direction of said Advisor.

Said Advisor may, in its discretion, remove any Successor Trustee appointed under the provisions of this Article, such removal to be evidenced by a writing signed by said Advisor and delivered to such Successor Trustee. Any Successor Trustee appointed under the provisions of this Article may resign upon executing its resignation and delivering the same to said Advisor. Upon the removal or resignation of any such Successor Trustee, it shall make delivery of all trust assets in its possession as said Advisor shall direct. Said Advisor shall have full power to approve its accounts and give it full and complete release and discharge as such

Successor Trustee hereunder. Upon the removal or resignation of any such Successor Trustee said Advisor may, and is hereby given power to, reappoint itself as Trustee hereunder or appoint some other trust company, wherever situated, having a capital and surplus of not less than Two Million Dollars (\$2,000,000) as Successor Trustee hereunder. If said Advisor shall reappoint itself as Trustee hereunder it shall thereupon have all the titles, powers, duties, rights and discretions of the original Trustee hereunder. If said Advisor shall appoint some other trust company as Successor Trustee hereunder such Successor Trustee shall have all the titles, powers, duties, rights and discretions of the original Trustee hereunder subject to the same provisions hereinabove set forth in sub-paragraphs (a), (b), (c) and (d) of this Article and also subject to the same provisions hereinabove set forth in respect to its removal and resignation. Said Advisor shall be entitled to reasonable compensation for its services hereunder.

V.

• The Donor shall have full power:

(a) to assign, transfer and deliver additional personal property or real property to the Trustee, to be held, managed, invested and distributed as part of any or all of said trust funds and subject to all of the terms and conditions hereof or to such other terms and conditions as the Donor, the Trustee and the Successor in Trust may by any indenture supplemental hereto agree upon;

(b) the Donor also reserves the right at any time during his lifetime, by written instrument delivered to the Trustee and the Successor in Trust, to appoint a new Trustee as Successor in Trust to the Trustee herein named, and/or to appoint a new Successor in Trust, and upon the appointment of any such new Trustee or

Successor in Trust, the new Trustee and/or Successor in Trust so appointed shall have the same duties, powers, titles, discretions and privileges as if such Trustee or Successor in Trust had been originally appointed hereunder, unless such powers are limited, enlarged, or modified by such written instrument.

VI.

The First National Bank of Chicago, if it becomes Trustee hereunder by reason of the death, incapacity, resignation or inability to act of E. L. CORD, the Trustee herein named, may resign its trust and in the event of such resignation a Successor Trustee may be appointed by an instrument in writing signed by a majority in interest of all of the adult beneficiaries of the trusts created hereby, provide however, that any Successor Trustee so appointed shall always be a bank or trust company having capital and surplus of not less than Two Million Dollars (\$2,000,000). Any successor trust company so appointed shall thereafter have the same rights, duties, and obligations discretionary and otherwise as are hereunder conferred upon The First National Bank of Chicago while acting as Successor Trustee in accordance with the provisions of Article III hereof, and with the consent of the adult beneficiaries entitled to receive income, may accept the account rendered and assets and property delivered to it by The First National Bank of Chicago, as Trustee, as a full and complete discharge of said Trustee and it shall incur no liability or responsibility to the beneficiaries of said trusts by reason of so doing.

VII.

Wherever in Articles III, V and VI of this agreement reference is made to "Trustee" or "Successor in Trust", it shall be taken to mean and include "Advisor" and "Successor Advisor" if at the time said provision becomes operative

an Advisor is then acting, provided, however, that the provisions of this paragraph shall not apply to Article IV hereof.

IN WITNESS WHEREOF, the Donor and Trustee has hereunto set his hand and seal and the Successor in Trust has caused this agreement to be executed by its authorized officer the day and year first above written.

(Signed) E. L. Cord (Seal)
E. L. Cord, Personally, as Donor

(Signed) E. L. Cord (Seal)
E. L. Cord, not Personally, but
as Trustee

THE FIRST NATIONAL
BANK OF CHICAGO
Successor in Trust

By O. A. Bestel
 Vice President

APPENDIX H

APPOINTMENT OF NEW TRUSTEE
UNDER TRUST INDENTURE

THIS INDENTURE made and executed in quintuplicate this 15 day of October, 1948, by E. L. CORD, of the City of Dyer, County of Esmeralda, State of Nevada, hereinafter referred to as "Donor",

WITNESSETH :

WITNESS under date of August 21, 1935, a Declaration of Trust was made and entered into by and between E. L. CORD, as Donor, E. L. CORD, not personally but as "Trustee", and THE FIRST NATIONAL BANK OF CHICAGO as "Successor in Trust", which said Declaration of Trust for the express benefit of NANCY VIRGINIA CORD, SALLY KIRK CORD, CHARLES ERRETT CORD and VIRGINIA KIRK CORD as the primary beneficiaries, and various other persons or classes of persons who might or might not share in the principal or income arising out of the trust estates so created; and that said Declaration of Trust is hereby incorporated herein by reference the same as though fully set forth herein; and

WHEREAS Donor pursuant to the provisions of said Declaration of Trust dated August 21, 1935, has elected to exercise the right to appoint a new Trustee as Successor in Trust to the Trustee E. L. Cord, all as reserved under the terms and provisions of said Trust.

NOW, THEREFORE, in consideration of the promises Donor does hereby declare and expressly provide as follows:

I.

Donor does hereby appoint THE FIRST NATIONAL BANK OF CHICAGO as the new "Trustee" to the Trustee E. L. Cord named in said Declaration of Trust dated August 21, 1935, and all of the terms and provisions set forth herein shall be binding upon and observed by the new "Trustee" and its successor or successors.

II.

Donor pursuant to the terms and provisions of said Declaration of Trust dated August 21, 1935, does hereby limit, enlarge, or modify the powers of the "Trustee" in the following particulars, and to the following extent:

(a) In subdivision (d) of Article I of said Declaration of Trust after the word "security" in the first line of said subdivision and Article, there is hereby added the following words, "or real property".

(b) Section (c) of Article I of said Declaration of Trust is hereby enlarged or modified to read as follows:

"(o) to consent to the reorganization, consolidation, readjustment of the financial structure or sale of the assets, of any corporation or other organization, or the liquidation of any corporation, the securities of which constitute a portion of the trust funds, and to take any action with reference to such securities which, in the opinion of the Trustee is necessary to obtain the benefit of any such reorganization, consolidation, readjustment, liquidation or sale; also to exercise any voting rights, conversion privilege, or subscription right given to the Trustee as the owner of any security constituting a portion of the trust funds; to accept and hold as a portion of the trust funds the securities resulting from any such reorganization, consolidation, liquidation, readjustment, sale, conversion or subscription; and to exchange any assets of the trust fund for any stock, bonds, debentures, or any combination thereof, of any corporation."

(c) The "Trustee" hereby appointed shall have no right or powers to exercise any right, or privilege provided for in paragraph IV of said Declaration of Trust.

(d) The restriction contained in the last paragraph in Article III of said Declaration of Trust, which appears in

the following words, to wit: "but therefore in making any new investments for said trust estates, shall only make such investments as are legal investments for trust funds under the laws of the State of Illinois and in force", is hereby removed.

(e) The Trustee shall keep the Trust Funds invested in stocks, voting trust certificates and other securities and any other property real or personal, (other than fixed obligations, whether secured or unsecured), in its judgment having sound intrinsic values even though such securities or property produces no income or produces only a nominal income, and shall make no investments in bonds, debentures, mortgages or other fixed obligations, either public or private, unless requested so to do by the Investment Consultant or Investment Consultants acting and in making and retaining investments the Trustee shall not be restricted to the usual standards of diversification but may invest all or substantially all of any of the trust funds in any one type of security or property.

Each beneficiary of a *trust fund* who is now, or who shall hereafter become, twenty-five (25) or more years of age shall be and is hereby appointed Investment Consultants of his or her trust fund. When there is no Investment Consultant qualified and willing and able to act as Investment Consultant of any trust fund as above provided in this paragraph, then until there shall be such an Investment Consultant qualified and willing to act, the Donor's wife, Virginia Kirk Cord, and his son, Charles Errett Cord, or such of them as shall from time to time be living and willing and able to act, shall act as Investment Consultants for such trust fund and whenever neither of said Virginia Kirk Cord or Charles Errett Cord are living and willing and able to act, the oldest living child if any, of the Donor who is then twenty-five (25) or more years of age is hereby appointed the Investment Consultant of any such trust fund or estate.

The Trustee shall not at anytime or times, whether or not there is an Investment Consultant or Consultants qualified and acting as hereinabove provided, make any sale or Investment of any property or money comprising any *trust fund*, except upon the written approval of such Investment Consultant or Investment Consultants, nor shall the Trustee exercise the power given it by paragraph (o) of said Agreement, as changed herein, without such approval. Failure to notify the Trustee in writing of the disapproval of any proposed sale or investment or other action requiring approval within thirty (30) days after notice thereof has been mailed to the person or persons whose approval is or are required at his, her or their last address known to the Trustee, shall constitute an approval thereof and the Trustee shall be in no way liable or responsible for any loss resulting to any trust fund or any beneficiary thereof by reason of the retention of any property the sale of which has been expressly disapproved or by reason of its failure to invest any money or take any other action requiring approval if such investment or other action has been expressly disapproved.

Any Investment Consultant may by instrument in writing delivered to the Trustee waive his or her right so to act for any period or periods of time that he or she may specify and as to all, some or any of the actions requiring his or her approval and during the period of any such waiver the Investment Consultant for such trust fund shall be the person or persons who would be such Investment Consultant were such Investment Consultant deceased or less than twenty-five (25) years of age.

(f) The tenure of office of the "Trustee" shall be for only such period of time as the majority of the adult beneficiaries of the trust estates or funds shall approve, and the "Trustee" shall only exercise the titles, powers, duties, rights and discretions as set forth in said Declaration of Trust and as limited, modified, or enlarged by this

Appointment until removed by a majority of the adult beneficiaries. The majority of the adult beneficiaries of the trust estates or funds created may from time to time and whenever they shall deem it advisable, appoint a new "Trustee", and/or "Successor Trustee" by an instrument signed in writing, provided, however, that any new "Trustee", and/or "Successor Trustee" so appointed shall always be a bank or trust company having capital and surplus of not less than Two Million Dollars (\$2,000,000), and any such new "Trustee", and/or "Successor Trustee" so appointed shall thereafter have the same rights, duties, and obligations discretionary and otherwise, as are conferred upon the "Trustee" and/or "Successor Trustee", as provided in said Declaration of Trust dated August 21, 1935, and as limited, enlarged or modified by his appointment.

III.

Concurrently with the acceptance by the "Trustee" of the provisions of this instrument and of the trusts created in the Declaration of Trust dated August 21, 1935, Donor irrevocably releases and relinquishes each and every power granted to and/or retained by him in any capacity under the said Declaration of Trust; and Donor specifically, and without limiting the generality of the foregoing, irrevocably releases and relinquishes any power which he may now have (a) to alter, amend or revoke the trusts, or any of them, created by said Declaration of Trust; (b) to designate the persons who shall possess or enjoy the income and principal of the trust estates, or any of them; (c) to change the beneficial interests in the trust estates, or any of them; (d) to manage or control the principal or income of the trust estates, or any of them; and (e) to receive at any time any part of the principal or accumulated income of the trust estates, or any of them, as an heir at law of any beneficiary of any of said trust estates.

IV.

Except as otherwise expressly provided herein, Donor does hereby ratify, confirm and approve each and every provision of said Declaration of Trust dated August 21, 1935.

IN WITNESS WHEREOF, Donor has set his hand and seal the day and year first above written.

E. L. CORD
Donor

ACCEPTANCE BY NEW TRUSTEE

The undersigned does hereby agree to act as "Trustee" and/or "Successor Trustee" under and pursuant to the foregoing appointment made by E. L. CORD, under said Declaration of Trust dated August 21, 1935.

DATED: October 20, 1948.

THE FIRST NATIONAL BANK
OF CHICAGO

By
Vice President

APPENDIX I

DECLARATION OF TRUST

COLL GILLIES, a single man of the City of Chicago, County of Cook, State of Illinois, herein referred to as "Trustee", hereby declares:

- (a) That he has received (without payment of any consideration therefor) from the persons and trusts named or described in Exhibit "A" attached hereto, a Deed purporting to convey to him the real property described on the attached "Trust Property Exhibit "B";
- (b) That the beneficial interest under this trust hereby is vested in said persons and trusts in the percentages set opposite their respective names in said Exhibit "A", the foregoing persons being herein referred to individually and jointly as "Beneficiaries"; and
- (c) That the Trustee will hold such title as was received by him in and to the property described in the "Trust Property Exhibit "B" in trust under the terms and conditions set forth in this instrument, and for the following purposes:

I.

POWERS OF TRUSTEE

The Trustee hereunder shall have the following powers; and none other:

- (1) To hold title to property of the trust estate; to collect all rents from said property; to pay and discharge all costs, charges and expenses of any description connected with or growing out of the execution of this trust; to pay, when due, all installments of principal and interest on any indebtedness which may constitute a lien on the property of the trust estate; to pay, when due, all premiums on insurance

carried on or by reason of the ownership of the property of the trust estate; and to disburse to the beneficiaries hereof, on or before the last day of each calendar month, in accordance with their beneficial interests all funds then remaining in its hands after payment of the costs, charges and disbursements hereinbefore mentioned.

(2) Without limitation arising out of the enumeration of the aforesaid powers, the Trustee shall at all times deal with the trust estate in accordance with such instructions or authorizations as may from time to time be given to it in writing signed by the then owners of not less than fifty-one percent (51%) of the total beneficial interests hereunder, or by their respective agents thereunto lawfully authorized; provided, however, that the Trustee shall not be required to enter into any personal obligation or liability in dealing with any property of the trust estate nor to make himself liable for any damages, costs, expenses, fines or penalties. The Trustee shall not be required to inquire into the propriety of any such authorization or direction, and shall not be liable to any beneficiary or other person by reason of any act done by it in pursuance of such instructions or authorizations.

The beneficiaries hereunder, both the present beneficiaries and their successors, shall at all times be liable for the payment of all taxes, insurance, interest and principal upon mortgages and other proper charges against the property from time to time comprising the Trust Estate and agree upon demand from the Trustee to deposit with the Trustee funds sufficient to satisfy the same.

(3) It is expressly understood that the full legal title to the trust properties hereunder shall vest in the Trustee as such vesting is necessary to the fulfillment of the purposes of this Trust.

II.

RIGHTS OF BENEFICIARIES

The beneficial interest of any beneficiary hereunder shall conclusively be deemed to be personal property, and the right of any beneficiary shall be limited to the enforcement of the provisions hereof; provided, however, that the beneficiaries hereunder shall in their own right have at all times the full management and control of the property of the trust estate, including the renting, sale or other disposition thereof, by means of instructions and authorization given to the Trustee in writing and signed by the then owners of not less than sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of the beneficial interest; provided, further, that no beneficiary or beneficiaries hereunder shall have any authority to contract for or in the name of the Trustee or the trust estate.

In case of the death of any beneficiary hereunder during the existence of this trust, his or her right and interest hereunder shall pass to his or her executor or administrator, and not to his or her heirs at law, and no beneficiary and no widower, widow, heir, devisee or legatee of any beneficiary shall have any right of dower, inheritance, homestead, partition or any other real property right, statutory or otherwise, in any property whatsoever forming a part of the trust estate. The death of any beneficiary hereunder shall not terminate this trust nor in any manner affect the powers of the Trustee hereunder.

The rights of all of the beneficiaries hereunder shall be subject to all of the terms and provisions of this agreement, and all such beneficiaries and their successors or assigns shall be bound by all of the provisions hereof and by all amendments and modifications hereof made in accordance with the provisions hereof.

III.

TRANSFER OF INTEREST BY BENEFICIARIES

The interest of the beneficiaries hereunder either in whole or in part, shall be assignable. No transfer of any interest under this trust shall be valid or binding upon the Trustee until an executed original of the instrument evidencing the transfer shall have been filed with the Trustee, and until the transferee shall have consented to this instrument in form satisfactory to the Trustee.

Each duplicate of this instrument must be surrendered to the Trustee upon the termination of this Trust.

IV.

AMENDMENTS TO OR REVOCATION OF TRUST
AND TERM THEREOF

This trust may be amended, revoked, or terminated at anytime upon the written direction of not less than fifty-one percent (51%) of the total interest of the beneficiaries, as such interest appears on the records of the Trustee. No amendment however, shall enlarge the duties or responsibilities of the Trustee, or affect his fees hereunder, without the written consent of the Trustee.

Unless sooner terminated or otherwise amended, this Trust shall fully cease and terminate upon the expiration of twenty-one (21) years from the date hereof, whereupon the entire net trust estate shall be conveyed, transferred and delivered (without collection of consideration therefor and subject to all matters then against the same) to the beneficiaries as their interest then appears on the records of the Trustee.

V.

CHANGE OF TRUSTEE

The Trustee may resign at any time upon written notice to each of the beneficiaries, provided, however, that the Trustee shall first transfer and convey his then present title in and to trust property to a new Trustee to be named and appointed by not less than fifty-one percent (51%) of the total interest of the beneficiaries.

In the event of the death of the Trustee, not less than fifty-one percent (51%) of the total interest of the beneficiaries shall nominate and appoint a new Trustee to act hereunder. Likewise, in the same manner and at any time or times, not less than fifty-one percent (51%) of the interest of the beneficiaries may remove the Trustee and appoint a new Trustee to act hereunder. Upon removal of the Trustee herein named, the Trustee shall transfer and convey his present title in and to the trust property to the new Trustee.

VI.

BINDING UPON SUCCESSORS AND ASSIGNS

The provisions hereof shall bind the Trustee, his successors and assigns, the beneficiaries and their heirs, legatees, devisees, administrators, executors, representatives, successors and assigns.

DATED, this 1st day of March, 1955.

COLL GILLIES

APPROVAL OF BENEFICIARIES

We, the undersigned beneficiaries hereby fully approve the foregoing Declaration of Trust, No. 45744, of COLL

GILLIES, Trustee, and certify that it declares the terms and conditions under and upon which the trust property is to be held by the aforesaid Trustee.

DATED, this 1st day of March, 1955.

EHLAND

THE FIRST NATIONAL
BANK OF CHICAGO,
as Trustee under its Trust Nos.
37500/05 and Trust Nos.
45039/41

By R. R. MANSFIELD
Assistant Vice President

EXHIBIT "A"

	<u>Name of Owner</u>	<u>Percentage of Interest</u>
1.	The First National Bank of Chicago as Trustee, Trust No. 37500	10%
2.	The First National Bank of Chicago as Trustee, Trust No. 37501	10%
3.	The First National Bank of Chicago as Trustee, Trust No. 37502	10%
4.	The First National Bank of Chicago as Trustee, Trust No. 37503	10%
5.	The First National Bank of Chicago as Trustee, Trust No. 37504	10%
6.	The First National Bank of Chicago as Trustee, Trust No. 37505	10%
7.	The First National Bank of Chicago as Trustee, Trust No. 45039	1%
8.	The First National Bank of Chicago as Trustee, Trust No. 45040	1%
9.	The First National Bank of Chicago as Trustee, Trust No. 45041	1%
10.	E. L. Cord	37%
		<hr/> 100%

TRUST PROPERTY — EXHIBIT "B"

(1) All of the following described parcels of real property situated in the City of Beverly Hills, County of Los Angeles, State of California, together with all improvements and buildings located thereon, to-wit:

Lots 747, 748, 749, 750, 755, 756, 757, 758, 759, 760, and 761 of Tract No. 7710 in the City of Beverly Hills as per map recorded in Book 83, Pages 94 and 95 of Maps in the office of the County Recorder of Los Angeles County.

SUBJECT TO:

(a) Any and all taxes; and

(b) All covenants, conditions, restrictions, reservations, rights, rights of way, easements, leases, and other matters of record, including but not limited to deed of trust covering all of said lots except Lot 761, dated February 11, 1952, recorded in the office of the County Recorder of Los Angeles County on March 6, 1952, executed by Beverly Hills Corporation, a corporation, to Title Insurance and Trust Company, a corporation, trustee, to secure an indebtedness of \$600,000.00 in favor of the Prudential Insurance Company of America, a corporation.

(2) All of that certain personal property located on the above described real property and known by street address as 133 South Lasky Drive, Beverly Hills, California, as described and set forth in a Bill of Sale delivered concurrently herewith to the Trustee named herein, and incorporated herein by reference, the same as though fully set forth herein.

APPENDIX J

SUPERIOR COURT of the STATE of CALIFORNIA
FOR the COUNTY of LOS ANGELES. DOUGLAS A.
SCOTT- Plaintiff, v. L, INC., et al., Defendants AND
RELATED CROSS-ACTIONS No. EAC 25905 (Trans-
ferred to Central District) POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO VACATE AND ENTER
DIFFERENT JUDGMENT (TO BE HEARD IN DEPT.
31)

* * *

The 1976 revision of the partition statute continues this preference (CCP §872.810), but the standard for allowing the sale of the property has been changed from "great prejudice" to "more equitable" thereby enabling sale in cases in which it was previously precluded (CCP §872.820). It is plaintiff's position that the 1976 amendment cannot affect the rights of parties to the 1935 trust and any attempt to use the more relaxed standard would be unconstitutional. However, even if the "more equitable" standard was used, Hummel contends that it would still not favor partition by sale in this case.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. No. EAC 25905. Douglas A. Scott Plaintiff, v. L, Inc., et al., Defendants AND RELATED CROSS-ACTIONS. (Transferred to Central District) POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL (TO BE HEARD IN DEPT. 31).

The 1976 revision of the partition statute continues this preference (CCP §872.810), but the standard for allowing the sale of the property has been changed from "great prejudice" to "more equitable" thereby enabling sale in cases in which it was previously precluded (CCP §872.820). It is plaintiff's position that the 1976 amendment cannot affect the rights of parties to the 1935 trust and any attempt to use the more relaxed standard would be unconstitutional. However, even if the "more equitable" standard was used, Hummel contends that it would still not favor partition by sale in this case.

SECOND CIVIL NO. 70081. IN THE COURT OF APPEAL SECOND APPELLATE DISTRICT STATE OF CALIFORNIA. SALLY CORD HUMMELL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL, ERRETT ALLAN HUMMEL AND DOUGLAS A. SCOTT, Appellants, v. MONT PELERIN CORPORATION, N.V., Respondent. APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY. HONORABLE LESTER E. OLSON, JUDGE PRESIDING. OPENING BRIEF OF APPELLANTS SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL AND ERRETT ALLAN HUMMEL. PAUL M. MAHONEY OF JONES, MAHONEY & BRAYTON, 100 Pomona Mall West, Suite 506 Pomona, California 91766 714/623-2411, Attorneys for Appellants SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL and ERRETT ALLAN HUMMEL. power, and no minority interest ever acted as if such a power existed.

* * *

The 1976 revision of the partition statute has relaxed somewhat the standard for allowing the sale of the Property. Whereas prior to 1976 the party seeking partition by sale had the burden of showing that partition by physical division would cause "great prejudice" to the owners, the amendment in 1976 provides that a court can order a sale if a sale is more equitable to the owners. CCP §§ 872.810 and 872.820. It is HUMMEL's position that the 1976 revision cannot affect the rights of parties to the 1935 Trust, and any attempt to use the more relaxed standard would be unconstitutional.

* * *

SECOND CIVIL NO. 70081 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR, SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL, ERRETT ALLAN HUMMEL and DOUGLAS A. SCOTT, Appellants, v. MONT PELERIN CORPORATION, N.V., Respondent. PETITION FOR REHEARING TO RECONSIDER THE DECISION FILED IN THIS COURT IN THIS ACTION ON MAY 23, 1984. PAUL M. MAHONEY OF JONES, MAHONEY & BRAYTON, 100 Pomona Mall West, Suite 506, Pomona, California 91766, 714/623-2411, Attorneys for Appellants SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL and ERRETT ALLAN HUMMEL.

To the Presiding Justice, and to the Associate Justices of the Court of Appeal of the State of California, Second Appellate District, Division Four, Appellants SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL HUMMEL, AND ERRETT ALLEN HUMMEL petition for a rehearing to reconsider the decision filed in this Court in this action on May 23, 1984, on the following grounds.

PRELIMINARY STATEMENT

This Petition for Rehearing seeks a new hearing as to all issues decided by this Court, including but not limited to this Court's decision upholding the right of Respondent to compel a partition of property held in trust by the 1935 Cord Trust when the beneficiaries of said trust property could not compel its partition. Appellants contend this decision is wrong and totally obliterates long-established law pertaining to the administration of trusts. However, this Petition will focus on the portion of the Court's decision

upholding the trial court's order that the property in question be sold rather than divided. In particular, Appellants will more fully develop the constitutional arguments previously raised, namely that to apply California Code of Civil Procedure Sections 872.820 and 872.840 to the 1935 CORD Trust is unconstitutional. Appellants also will reinforce the argument they previously made that was not addressed in the Court's decision, namely that under California case law a court cannot order a trustee to deviate from the terms of a trust except in rare instances. It is Appellants' position that the Court's decision ordering a sale is clearly erroneous on at least four grounds and that rehearing must be granted in order to correct the errors.

1. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 872.820 AND 872.840 WHICH ALLOW PROPERTY IN AN EXPRESS TRUST TO BE SOLD CANNOT CONSTITUTIONALLY BE APPLIED TO THE 1935 CORD TRUST

A. BOTH THE UNITED STATES AND CALIFORNIA CONSTITUTIONAL PROHIBITIONS AGAINST ENACTING LAWS IMPAIRING CONTRACTS PROHIBIT PARTITION BY SALE OF ANY PROPERTY IN THE 1935 CORD TRUST.

Article I, Section 10 of the United States Constitution provides in pertinent part that:

"1. No State shall . . . pass any . . . law impairing the obligation of contracts, . . ."

Article 1, Section 9 of the California Constitution provides in pertinent part that:

"A . . . law impairing the obligation of contracts may not be passed."

The Fourteenth Amendment of the United States Constitution provides in pertinent part that:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law;"

Article 1, Section 7 of the California Constitution provides in pertinent part that:

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;"

In the case at bar, California Code of Civil Procedure Section 872.820 and 872.840 cannot constitutionally be applied by the Court to the 1935 Cord Trust because to do so would allow a court to order the sale of real property in the 1935 Trust even though the trustee is not authorized, according to the terms of the Trust, to sell any Trust assets without the consent of Appellant SALLY CORD HUMMEL (hereinafter referred to as "HUMMEL"). This would unconstitutionally impair the contractual obligations existing between the trustee and the beneficiaries, thereby causing substantial harm. In discussing what is included within the ambit of Article I, Section 10, the United States Supreme Court as far back as 1877 stated that:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract is such in the view of the law ceases to be and falls into the class of those 'imperfect obligations' as they are termed which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable." *Edwards v. Kearzey*, 96 U.S. 595, 6 Otto. 595, 24 L.Ed. 793 (1877).

It is settled that the constitutional prohibition against impairment of contractual obligations is not absolute, but rather that contract rights, as all other property rights,

may be altered by legislation validly enacted under the state's police power. *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 428, 434-436, 78 L.Ed. 413, 423, 426-428, 54 S.Ct. 231 (1934); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 305, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-245, 57 L.Ed.2d 727, 736-37, 98 S.Ct. 2716 (1978).

The appropriate inquiry is whether the impairment of contract rights is "sufficiently necessary to the public welfare as to justify the impairment." *In re Marriage of Bouquet*, 16 Cal.3d 583, 592, 128 Cal.Rptr. 427, 546 P.2d 1371 (1976); *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal. 3d at 296.

Probably the single most important factor to be considered in determining whether a particular impairment is constitutionally permissible is the nature and extent of the impairment. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus*, *supra*, 436 U.S. at 245, 57 L.Ed.2d at 736-737. Other important factors to be considered are the nature, importance and urgency of the interest to be served by the challenged legislation and whether the legislation was appropriately tailored and limited to the situation necessitating its enactment. *See Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at 242-244, 57 L.Ed. 2d at 734-736; and *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 52 L.Ed.2d 92, 109-110, 97 S.Ct. 1505 (1977).

In the case at bar, when Cord created his Trust in 1935, and later when he added the Beverly Hills property to the Trust in the 1950's, there was no law which would have authorized a court to force a sale of Trust property in the 1935 Trust in view of the Trust provision that there could be no sale by the trustee without the consent of HUMMEL.

Even where, as here, this Court has held that although partition of the Trust property is not available to the beneficiaries of HUMMEL, nevertheless a co-tenant of the property can compel partition and circumvent the Trust (which result HUMMEL feels is clearly wrong), that does not mean that a court can constitutionally order the property sold in direct contravention of the Trust provisions and in violation of the wishes of the parties to the Trust. Usually cases of this type arise because one or another of the parties to a trust want the terms of the trust changed, but in this case all parties to the Trust have consistently urged that the property not be partitioned, let alone sold. (R.T., p. 114)

There is no policy of the law violated by following the express language of the 1935 Trust because upon HUMMEL'S death, the Trust assets are distributed to all of the beneficiaries. Since the property is marketable, the prohibition against sale without HUMMEL'S consent is not an illegal restraint on alienation. There is no other public policy of the State involved, and thus a court-ordered sale simply aids Respondent's efforts to acquire property held by the Cord family for 33 years to the detriment of HUMMEL and the other trust beneficiaries.

In the case at bar, the impairment of the contract is substantial and any suggestion to the contrary is simply wrong. As pointed out in Exhibit 44 (attached hereto as Exhibit A and incorporated herein by reference), if the property is sold the 1935 Trust must pay substantial income taxes. This, therefore, will *deplete* the *corpus* of the Trust. In addition to reducing the corpus of the Trust and altering the Trust structure because it will also include more cash than property, it eliminates the stated intention of the investment advisor to accumulate property and to deal with it as she deems fit, an act concurred in by the trustee and

the Trust beneficiaries and expressly authorized by the Trust. A sale of the property causes every party to the 1935 Trust to suffer a loss they don't want. Thus, Code of Civil Procedure Sections 872.820 and 872.840 cannot be constitutionally used to allow a court to order the trustee to sell the property, and the Court of Appeal's decision allowing this is wrong.

B. FORCING THE TRUSTEE TO SELL PROPERTY IN THE 1935 CORD TRUST CONTRARY TO THE EXPRESS TERMS OF THE TRUST VIOLATES SUBSTANTIVE DUE PROCESS AND DENIES APPELLANTS EQUAL PROTECTION UNDER THE LAW.

HUMMEL's and the other beneficiaries' rights under the 1935 Trust are vested. The 1935 Trust is irrevocable and thus application of Sections 872.820 and 872.840 which in any way alters or abrogates those rights violates the due process clause of the United States and California Constitutions.

The criteria for determining whether there is an impairment of a vested property interest by legislation are essentially the same as those considered in determining whether state legislation impairing contract rights violates the constitutional prohibitions against impairment of contracts. *San Diego White Truck Co. v. Swift*, 96 Cal.App.3d 88, 93, 157 Cal.Rptr. 745 (1979); *In re Marriage of Bouquet*, *supra*, 16 Cal.3d at 583; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 697 (1960).

In the case at bar, there is no interest of the State that is advanced by forcing the 1935 Trust to sell the property. The property is freely marketable, and a division in kind will allow the Trust to keep its corpus intact without ad-

verse financial consequences. On the other hand, a sale only benefits Respondent and causes immediate harm to the Trust and thus constitutes a taking without due process and denies them equal protection of the law because the Court's decision will give precedence to the alleged rights of a co-tenant to partition over a pre-existing contractual right allowing HUMMEL to prohibit a sale of Trust property without her consent.

II. THE RELAXED STANDARD AS TO WHEN PARTITION BY SALE IS ALLOWED PROVIDED IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 872.820 AND 872.840 CANNOT BE CONSTITUTIONALLY APPLIED TO THE 1935 CORD TRUST

In the case at bar, this Court on page 12 of its decision makes the statement:

"The judgment of partition will result in a division of a piece of the property in the trust corpus, it will not result in an alteration of the structure of the trust."

That statement is incorrect. The sale of the Trust property will result in a diminution of the corpus of the Trust because of payment of taxes. It will also hurt the diversity of the Trust because the Trust will have lost a valuable piece of real property against the wishes of the trustee, the investment advisor and the residual beneficiaries. Although Appellants contend that there was no evidence that it is "more equitable" to *all* of the parties to sell the property, nevertheless application of that relaxed standard is unconstitutional. At the time Cord placed the property in trust, the law in effect at the time required that the party seeking partition by sale, if the remedy of sale was available, had the burden of showing that partition by

physical division would cause "great prejudice" to the owners. Respondent presented no evidence as to prejudice and thus did not meet that standard.

This Court's opinion states that the retroactive application of Code of Civil Procedure Sections 872.820 and 872.840 to Appellants simply changes the nature of remedy involved and is not unconstitutional. This statement is clearly erroneous and contrary to holdings of the California Supreme Court. In both *Brown v. Ferdinand*, 5 Cal.2d 226 (1936), and *County of Los Angeles v. Jessop*, 11 Cal.2d 273 (1938), the California Supreme Court specifically stated that the remedy and the obligation of contracts were so necessarily intertwined that impairment of one could cause a substantial impairment of the other. Therefore, the characterization of the relaxed standard as a remedy, even if true, does not remove it from constitutional protection under both the United States and California Constitutions.

The Court, by authorizing the use of the "more equitable" standard, has allowed property vested in the Trust to be removed from that Trust against the wishes of all of the parties to the Trust. Therefore, not only is application of the "more equitable" standard an impairment of the obligation of contract and the taking of property without due process, it also is a denial of equal protection of the law.

Also, as the Court's opinion failed to note, there is a presumption against partition by sale, *Williams v. Wells Fargo Bank*, 56 Cal.App.2d 645 (1943), and forced sales are strongly disfavored. *Richmond v. Dofflemyer*, 105 Cal.App.3d 745, 164 Cal.Rptr. 727 (1980). Appellants know what is best for them economically in light of the clear language of the Trust, the clear tax law in effect at the time the Trust was created, and in light of Exhibit 44 which outlines in clear terms the tax consequences of a sale.

These facts were unrebutted and are things the investment advisor is entitled to consider when deciding whether or not to sell a Trust asset. Since the Trust instrument itself does not violate public policy, it is not proper for a court to abrogate the investment advisor's function in the name of upholding a co-tenant's right to partition.

2nd Civil No. 70081 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL and ERRETT ALLEN HUMMEL Petitioners, v. MONT PELERIN CORPORATION, N.V., Respondent. PETITION FOR HEARING FOLLOWING DECISION OF COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4, FILED MAY 23, 1984. PAUL M. MAHONEY OF JONES, MAHONEY & BRAYTON, 100 Pomona Mall West, Suite 506 Pomona, California 91766, 714/623-2411, Attorneys for Petitioners SALLY CORD HUMMEL, SECURITY BANK OF NEVADA, SECK & CO., PETER RUSSELL KIRK HUMMEL and ERRETT ALLEN HUMMEL.

* * *

III. CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 872.820 AND 872.840 WHICH ALLOW PROPERTY IN AN EXPRESS TRUST TO BE SOLD CANNOT CONSTITUTIONALLY BE APPLIED TO THE 1935 CORD TRUST.

A. BOTH THE UNITED STATES AND CALIFORNIA CONSTITUTIONAL PROHIBITIONS AGAINST ENACTING LAWS IMPAIRING CONTRACTS PROHIBIT PARTITION BY SALE OF ANY PROPERTY IN THE 1935 CORD TRUST.

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Article 1, Section 7 of the California Constitution provides in pertinent part that:

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . ."

In the case at bar, California Code of Civil Procedure Sections 872.820 and 872.840 cannot constitutionally be applied to the 1935 Trust because to do so would allow a court to order the sale of the real property in the 1935 Trust even though the trustee is not authorized, according to the terms of the Trust, to sell any Trust assets without the consent of HUMMEL. This would unconstitutionally impair the contractual obligations existing between the trustee and the beneficiaries, thereby causing substantial harm. In discussing what is included within the ambit of Article I, Section 10, the United States Supreme Court as far back as 1877 stated that:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract is such in the view of the law ceases to be and falls into the class of those 'imperfect obligations' as they are termed which depend for their fulfillment upon the will and conscience of those upon whom they rest. The

ideas of right and remedy are inseparable." *Edwards v. Kearzey*, 96 U.S. 595, 6 Otto. 595, 24 L.Ed. 793 (1877).

It is settled that the constitutional prohibition against impairment of contractual obligations is not absolute, but rather that contract rights, as all other property rights, may be altered by legislation validly enacted under the state's police power. *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 428, 434-436, 78 L.Ed. 413, 423, 426-428, 54 S.Ct. (1934); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 305, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-245, 57 L.Ed.2d 727, 736-37, 98 S.Ct. 2716 (1978).

The appropriate inquiry is whether the impairment of contract rights is "sufficiently necessary to the public welfare as to justify the impairment." *In re Marriage of Bouquet*, 16 Cal.3d 583, 592, 128 Cal.Rptr. 427, 546 P.2d 1371 (1976); *Sonoma County Organization of Public Employees v. County of Sonoma, supra*, 23 Cal.3d at 296.

Probably the single most important factor to be considered in determining whether a particular impairment is constitutionally permissible is the nature and extent of the impairment. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at 242-244, 57 L.Ed. 2d at 734-736; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 52 L.Ed. 2d 92, 109-110, 97 S.Ct. 1505 (1977).

In the case at bar, when Cord created his Trust in 1935 and later when he added the Beverly Hills property to the Trust in the 1950's, there was no law which would have authorized a court to force a sale of Trust property in the

1935 Trust in view of the Trust provision that there could be no sale by the trustee without the consent of HUMMEL. Even where, as here, the Court of Appeal has held that although partition of the Trust property is not available to the beneficiaries of HUMMEL nevertheless a co-tenant of the property can compel partition and circumvent the Trust (which result HUMMEL feels is clearly wrong), that does not mean that a court can constitutionally order the Property sold in direct contravention of the Trust provisions and in violation of the wishes of the parties to the Trust. Usually cases of this type arise because one or another of the parties to a trust want the terms of the trust changed, but in this case all parties to the Trust have consistently urged that the Property not be partitioned, let alone sold. (RT, p 114)

There is no policy of the law violated by following the express language of the 1935 Trust because upon HUMMEL'S death, the Trust assets are distributed to all of the beneficiaries. Since the Property is marketable, the prohibition against sale without HUMMEL's consent is not an illegal restraint on alienation. There is no other public policy of the State involved, and thus a court-ordered sale simply aids Respondent's efforts to acquire property held by the Cord family for 33 years to the detriment of HUMMEL and the other trust beneficiaries.

B. IF THE PROPERTY IS SOLD, THE TRUST CORPUS WILL BE DEPLETED BECAUSE OF HORRENDOUS TAX CONSEQUENCES.

In the case at bar, the impairment of the contract is substantial and any suggestion to the contrary is simply wrong. The 1935 Trust is a valuable resource for estate planning for the HUMMEL family because it pre-dates the effective date of the generation-skipping tax. The generation-skipping tax does not apply to generation-skipping

transfers from a trust that was irrevocable on June 11, 1976, except to the extent that the transfer is made from corpus added to the pre-existing irrevocable trust by any person after June 11, 1976. INTERNAL REVENUE REGULATIONS, § 26.2601-1(b)(1)(i). Application and accumulated income will not be considered additions to the corpus except to the extent that the appreciation or accumulated income results from prior non-exempt additions to the corpus. INTERNAL REVENUE REGULATIONS § 26.2601-1(a)(5).

Basically what the generation-skipping tax does is to impose a tax upon the death of an income beneficiary of a trust which is equivalent to the tax which would have been paid had the corpus of the trust been included in the taxable estate of the income beneficiary. Thus, for example, if the Trust had been created in 1977 instead of 1935, the entire corpus of the 1935 Trust with respect to which HUMMEL is entitled to income would be included in her estate when she does as if she owned it. This, of course, is not the case with trusts such as the 1935 Trust, irrevocable on June 11, 1976.

Because of the fact that the 1935 Trust is a valuable resource for estate planning purposes, it is not in the best interests of the HUMMEL family that the corpus of that Trust be diminished by the payment of income taxes. To the extent that income taxes are reduced or eliminated, additional funds are available for investment. These funds, as well as the growth attributable to these funds, will pass free of estate tax to HUMMEL's issue. If, on the other hand, the funds are used to pay income tax, then not only those funds but, more importantly, the growth of those funds will not be available for HUMMEL's issue.

Naturally, it can always be said that funds paid for income taxes will not be available for inheritance by future

generations. However, even though this is always undesirable from an estate planning point of view, it is particularly undesirable when the funds paid as income taxes, and future growth on those funds, would pass to future generations free of federal estate tax.

In the case at bar, if HUMMEL had sold her 15% interest for the \$510,000 paid to each of the other beneficiaries for their 15% (which HUMMELL contends is way below market value), the tax to HUMMEL would have been approximately \$165,000. (Exhibit 44) Even though HUMMEL is a Nevada resident, California state tax would have to be paid. Revenue and Taxation Code Section 17953 provides:

"Income of estates and trusts distributed or distributable to nonresident beneficiaries is income from sources within this State only if distributed or distributable out of income of the estate or trust derived from sources within this State. For the purposes of this section, the nonresident beneficiary shall be deemed to be the owner of intangible personal property from which the income of the estate or trust is derived."

HUMMEL chose, as investment consultant, to not incur this liability and to accumulate the asset for her children. This is an act of someone not selfishly accumulating and spending cash for "her" benefit as she could do under the terms of the 1935 Trust, but rather of someone using her love for her children and business sophistication to provide for her children by keeping an appreciating asset. This is what Cord wanted and that's why she was made investment consultant rather than simply giving the trustee unlimited powers.

The trial court held that Cord had a tax planning motive in creating the 1935 Trust, which he did. It is totally inconsistent to reach that conclusion and then hold that Cord intended that the Trust incur horrendous tax consequences

that will deplete corpus and give up appreciation on some of the most valuable property in the world. Also, it would be a waste of the trust vehicle to allow one trust's investment consultant to abrogate the investment consultant function of another trust and allow partition. Yet, if the lower court's decision is upheld, that will be the result.

Penasquitos, Inc. v. Holladay, 27 Cal.App.3d 356, 103 Cal. Rptr. 717 (1972), is analogous to the instant case because it, too, involved an attempt to deprive a co-tenant of an economic expectancy. In *Penasquitos*, Jim Holladay and Robert Holladay were tenants in common of property in San Diego. They had granted to Kahn, a majority shareholder of plaintiff *Penasquitos, Inc.*, a 99-year lease and an option to buy. *Penasquitos* then acquired Kahn's interests by assignment. In 1968, over six years later, Robert Holladay sold his 40% interest to *Penasquitos*, and Jim Holladay offered to sell his interest at the option price, but *Penasquitos* offered Jim the reasonable market value subject to the 99-year lease, an option owned by *Penasquitos*. Jim Holladay declined, and *Penasquitos* sued for partition and prevailed in the trial court. Holladay appealed. On appeal, the Court of Appeal reversed, pointing out that an action for partition is an equitable proceeding subject to the requirement of fairness and that the right to partition may be waived either expressly or by implication. The Court held that when the Holladays entered into the lease and option agreements with Kahn, the brothers Holladay waived their rights as co-tenants to partition. The Court held that when the lease and option agreements were taken as a whole it was apparent that they were designed to provide some security for the Holladays in the form of encouraging development of the property and the exercise by Kahn of the purchase option. The Court found that the lease and option agreements thus gave Holladay rights which, by the nature of the contracts, were joint. The Court held where the effect of a co-

tenancy partition is to substantially impair contractually-acquired joint rights, an agreement not to partition is implicit in the agreement. The Court held that the only way to preserve the reasonable expectations of Jim Holladlay under the contracts to which the property was subject was to deny partition.

A sale of the Property causes every party to the 1935 Trust to suffer a loss they don't want. Thus, Code of Civil Procedure Sections 872.820 and 872.840 cannot be constitutionally used to allow a court to order the trustee to sell the Property, and the Court of Appeal's decision allowing this is wrong.

C. FORCING THE TRUSTEE TO SELL PROPERTY IN THE 1935 TRUST CONTRARY TO THE EXPRESS TERMS OF THE TRUST VIOLATES SUBSTANTIVE DUE PROCESS AND DENIES PETITIONERS EQUAL PROTECTION UNDER THE LAW.

HUMMEL'S and the other beneficiaries' rights under the 1935 Trust are vested. The 1935 Trust is irrevocable and thus application of Sections 872.820 and 872.840 which in any way alters or abrogates those rights violates the due process clauses of the United States and California Constitutions.

The criteria for determining whether there is an impairment of a vested property interest by legislation are essentially the same as those considered in determining whether state legislation impairing contract rights violates the constitutional prohibitions against impairment of contracts. *San Diego White Truck Co. v. Swift*; 96 Cal.App.3d 88, 93, 157 Cal.Rptr. 745 (1979); *In re Marriage of Bouquet, supra*, 16 Cal.3d at 583; Hochman, *The Supreme Court and the*

Constitutionality of Retroactive Legislation, 73 Harv.L. Rev. 692, 697 (1960).

In the case at bar, there is no interest of the State that is advanced by forcing the 1935 Trust to sell the Property. The Property is freely marketable, and a division in kind will allow the Trust to keep its corpus intact without adverse financial consequences. On the other hand, a sale only benefits Respondents and causes immediate harm to the Trust and thus constitutes a taking without due process and denies Petitioners equal protection of the law because the court's decision will give precedence to the alleged rights of a co-tenant to partition over a pre-existing contractual right allowing HUMMEL to prohibit a sale of Trust property without her consent.

IV. THE RELAXED STANDARD AS TO WHEN PARTITION BY SALE IS ALLOWED PROVIDED IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 872.820 AND 872.840 CANNOT BE CONSTITUTIONALLY APPLIED TO THE 1935 TRUST.

A. THERE WAS NO EVIDENCE THAT THERE WOULD BE GREAT PREJUDICE TO ALL PARTIES IF THE PROPERTY WAS PHYSICALLY DIVIDED.

At the time E. L. Cord placed the Property in trust, the law in effect at the time required that the party seeking partition by sale, if the remedy of sale was available, had the burden of showing that partition by physical division would cause "great prejudice" to the owners. Great prejudice had to be shown without resort to unproved facts or judicial notice. Respondent presented *no* evidence that great "prejudice" would result if the Property were physi-

cally divided and thus did not meet its burden of proof. *Bartlett v. Mackey*, 130 Cal. 181, 62 P. 482 (1900).

B. USE OF THE MORE EQUITABLE STANDARD IMPAIRS THE TRUST'S CONTRACTUAL RIGHTS.

The 1976 revision of the partition statute has relaxed the standard for allowing the sale of the Property by providing that a court can order a sale if a sale is more equitable to the owners. Code of Civil Procedure §§ 872.810 and 872.820. It is HUMMEL's position that the 1976 Code revision cannot affect the rights of parties to the 1935 Trust, and any attempt to use the more relaxed standard would be unconstitutional.

The Court of Appeal's opinion states that the retroactive application of Code of Civil Procedure Sections 872.820 and 872.840 to Petitioners, which allowed the more equitable standard to be used, simply changed the nature of remedy involved and was not unconstitutional. This statement is clearly erroneous and contrary to holdings of the California Supreme Court. In both *Brown v. Ferdinand*, 5 Cal.2d 226 (1936), and *County of Los Angeles v. Jessup*, 11 Cal.2d 274 (1938), the California Supreme Court specifically stated that the remedy and the obligation of contracts were so necessarily intertwined that impairment of one could cause a substantial impairment of the other. Therefore, the characterization of the relaxed standard as a remedy, even if true, does not remove it from constitutional protection under both the United States and California Constitutions.

The Court of Appeal, by authorizing the use of the "more equitable" standard, has allowed property vested in the Trust to be removed from that Trust against the wishes

of all of the parties to the Trust. Therefore, not only is application of the "more equitable" standard an impairment of the obligation of contract and the taking of property without due process, it also is a denial of equal protection under the law because Petitioners' pre-existing contract rights have been impaired by granting Respondent the right to compel a sale.

No. 84-614

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In the Supreme Court
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United States

OCTOBER TERM, 1984

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PETER RUSSELL KIRK HUMMEL and ERRETT ALLEN HUMMEL,
Petitioners,

vs.

MONT PELERIN CORPORATION, N.V.,
Respondent.

On Petition For Writ of Certiorari
to the Court of Appeal of the
State of California, Second
Appellate District, Division Four

BRIEF OF RESPONDENT
MONT PELERIN CORPORATION, N.V.
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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Respondent Mont Pelerin Corporation, N.V. ("Mont Pelerin") hereby submits its Brief in Opposition to the Petition For Writ of Certiorari filed by petitioner Sally Cord Hummel and others on October 17, 1984.¹ This Brief is filed to point out that the questions petitioners would present to this Court are not even raised by the challenged decision of the California Court of Appeal, for reasons noted

¹Mont Pelerin has no parent companies, subsidiaries or affiliates.

in the following paragraphs. Moreover, the Petition does not even appear to allege that the challenged decision is in conflict with another decision of a State Court, or with a decision of any Federal Court. The Petition should be denied for that reason as well.

In essence, the first question petitioners would present is whether their federal constitutional rights have been violated by a holding that certain real property in which they have a minority beneficial interest should be partitioned and sold, despite "express terms of the trust" in which their interest is held prohibiting a partition sale. However, that question, offered in the form of two different questions, is not in fact presented by the record. The Court of Appeal found that petitioners were simply misreading the relevant trust documents, and that nothing in those documents prohibits a partition sale of the subject property. (Petition, Appendix C, at C-9 to C-11) The Court of Appeal clearly indicated that it would have ruled in the petitioners' favor, if their reading of the relevant trust documents had been correct. (*Id.*) Accordingly, the first question actually presented for review is whether trust documents were properly construed — a question of contract interpretation of no federal significance whatsoever.²

The only other question petitioners would present is whether their constitutional rights have been violated by purported "retroactive" application of 1976 revisions to the California partition statute. However, no such question is presented by the facts of this case, as the result petitioners complain of — sale rather than division of the subject property — would have been the same under pre-1976 or post-

²Indeed, the Court of Appeal also indicated that the party requesting partition and sale of the subject property — Mont Pelerin — is a successor-in-interest to persons who were never parties to the trust documents, and thus is not bound by the terms of those documents in any event. (Petition, Appendix C, at C-9)

1976 California law. The Court of Appeal concluded that the subject property should be partitioned by sale because "the value of each party's interest" in the property "would be substantially diminished by its division" rather than its sale. (Petition, Appendix C, at C-14) Pre-1976 California law likewise provided for partition by sale where the value of property "would be substantially diminished by its division". *Romancheck v. Romancheck*, 248 Cal.App.2d 337, 344, 56 Cal.Rptr. 360, 365 (1965); *Cunningham v. Frymire*, 160 Cal.App.2d 726, 729, 325 P.2d 555, 558 (1958); *Formosa Corp. v. Rogers*, 108 Cal.App.2d 397, 411, 239 P.2d 88, 97 (1951); *Sting v. Beckham*, 94 Cal.App.2d 823, 825, 211 P.2d 586, 587 (1949).

The Petition For Writ of Certiorari should therefore be denied.

Respectfully submitted,

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